





# San Francisco Law Library

No. \_\_\_\_\_

Presented by

\_\_\_\_\_

## EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.



















1006  
2746

---

IN THE  
United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT.

---

John Grant Lyman,	}
<i>Plaintiffs in Error,</i>	
<i>vs.</i>	
United States of America,	
<i>Defendant in Error.</i>	

---

---

BRIEF OF PLAINTIFF IN ERROR.

---

Filed

PAUL W. SCHENCK, AUG 21 1916

RICHARD KITTRELLE,

**F. D. Monckton,**  
*Attorneys for Plaintiff-in-Error.*

**Clerk.**

621 Homer Laughlin Bldg., Los Angeles, Cal.





IN THE  
United States  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

---

John Grant Lyman,	}
<i>Plaintiffs in Error,</i>	
<i>vs.</i>	
United States of America,	
<i>Defendant in Error.</i>	}

---

**BRIEF OF PLAINTIFF IN ERROR.**

This case comes here on a writ of error to the United States District Court for the Southern District of California, Southern Division, granted February 6, 1914 [Tr. fol. 2], to review a judgment of said court dated February 9, 1914 [Tr. fol. 193], sentencing plaintiff in error (hereafter called defendant) to imprisonment for eighteen months in the state prison at San Quentin, California, after a verdict finding him guilty of using the United States post-office establishment in furtherance of a scheme to defraud divers persons [Tr. fol. 189], on an indictment which is divided into six counts, which charge the defendant with using the postoffice establishment of the United States in the execution of a scheme to defraud divers persons out of their property and



money. The defendant was found guilty on the first count of said indictment and not guilty on the remaining five counts of said indictment [Tr. fol. 189].

The first count of said indictment charges that on or about May 1, 1911, the defendant had devised and had intended to devise a scheme and artifice to defraud divers persons out of their money and property in and by inducing them, by false and fraudulent representations, to pay and transfer to the Panama Development Co., a corporation, said corporation being under the full and complete control, charge and management of the defendant, in the belief that they, said persons, were paying and transferring their money and property to said corporation as agent for the Panamanian government in the purchase of Panama government lands through said corporation, as such agent; defendant well knowing and intending that they, said persons, were not and would not purchase through said corporation as such agent, and that said corporation was not and would not be such agent; and that said defendant intended to secure and convert a large part of said money and property so obtained to his own use, or to the use of said corporation.

The indictment further charges that in furtherance of said scheme defendant falsely and fraudulently represented and pretended to said persons as follows:

That said defendant would organize and incorporate said corporation and would represent, announce, publish and advertise to all of said persons intended to be defrauded, in the name of said corporation, that

said corporation had a paid up capital stock of \$50,000.00; that some of the officers and directors were prominent in, connected with and employed by the government of Panama, and that other officers and directors were prominent elsewhere; that said corporation was agent for the Panamanian government for the sale of said land; that said government offered for sale said lands through said company as agent; that said lands consisted of agricultural, timber and mineral lands situated in the districts of Colce, Veragua and Chiriqui, in said republic of Panama; that said land could be purchased through said company as agent at prices from \$3.00 to \$5.00 per acre, payable one-half down to said agent, and the balance to said agent within four years; that upon such application to said agent and the making of said payment, said corporation would file application for land through its corporation representative in Panama, and the Panamanian government would make allotments of lands and issue provisional title direct to applicant, and thereafter, upon the payment of balance of price to the corporation and cultivation of four-fifths of said land, the government would issue full title; that said corporation had experts in Panama familiar with the lands, who would select the best land for the applicants; that the corporation could and would furnish maps showing agency lands and could and would designate offered lands thereon; that the corporation had sold an American colony 10,000 acres in Agua Dulce; that the corporation, as agent for said Panamanian government, offered said government lands for sale;

that a railroad was being constructed from the city of Panama to the city of David; that the said corporation was clearing and cultivating some government land theretofore sold through corporation as agent of said government; that said corporation had and offered for sale 16,000 acres of government land in Veragua; that on August 6, 1911, said government would advance the price to \$6.00 per acre; that at any time within two years dissatisfied purchasers could have their money back.

That the defendant did on the 28th day of August, 1911, for the purpose of executing said scheme and artifice to defraud, knowingly, unlawfully and wilfully cause to be placed in the postoffice of the United States, in the city of Los Angeles, state of California, within the Southern District of California, a certain sealed envelope containing a certain letter [Tr. fol. 14] to be sent and delivered by said postoffice to Mr. Frederick L. Anderson, Soldiers' Home, California, Ward 9.

The second, third, fourth, fifth and sixth counts of the indictment are in substantially the same language as the first count, except that they charge the mailing of letters addressed to the persons named in each of said counts. [Second count, Tr. fols. 15-24; third count, Tr. fols. 24-28; fourth count, Tr. fols. 28-32; fifth count, Tr. fols. 33-37; sixth count, Tr. fols. 37-40.]

The trial commenced on October 16th, 1913, before Judge Olin Wellborn and a jury. On December 10th, 1913, the jury returned a verdict finding the defendant



guilty under the first count of the indictment, and not guilty under each of the remaining five counts of the indictment [Tr. fol. 189.]

The defendant made a motion for a new trial [Tr. fol. 190], which was denied, and defendant excepted [Tr. fol. 194]. Thereupon defendant made a motion in arrest of judgment [Tr. fol. 192], which was denied [Tr. fol. 194].

The defendant was sentenced to eighteen months' imprisonment in the state prison at San Quentin, California [Tr. fol. 194].

The questions involved in this writ of error are the admission, over defendant's objection, of letters, books and papers which had been unlawfully seized from the possession of defendant by the government, without warrant or authority of law, and defendant was seized and taken into custody; a warrant of arrest was not served on defendant until after he had been arrested and placed in jail after a seizure of his papers. There is no dispute as to the unlawful seizure of defendant's papers; the testimony of the government's witnesses shows that defendant's papers were taken without any warrant or authority of law.

The defendant objected to the introduction in evidence of defendant's papers unlawfully seized by the government, and exceptions were duly taken and allowed.

The defendant contends that this evidence was incompetent because it was obtained by the government in violation of his constitutional rights under the fourth and fifth amendments to the federal Constitution.

2.

THE INSTRUCTION GIVEN BY THE COURT AS SET OUT  
IN THE 148TH ASSIGNMENT OF ERROR.

[Tr. fol. 1301.]

The first assignment of error [Tr. fols. 1076-1077] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to the Stoddard Incorporating Company of Phoenix, Arizona, and signed "J. G. Lyman," requesting said company to incorporate the Panama Development Company, authorized capitalization \$1,000,000.00, par value shares \$10.00. The letter also contains a request to change the name of the Wyoming Oil and Development Company to that of "Wyoming Oil and Refining Company," and for the deeding of certain property from the old to the new oil company. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1077].

The second assignment of error [Tr. fols. 1077-1080] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to the defendant at Los Angeles, California. Said letter being in answer to the letter referred to in defendant's first assignment of error. The contents of this letter acknowledge receipt of \$50.00 and inform the defendant that it can be of no advantage to elect a board of three temporary dummy directors for his proposed corporation. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fols. 1078-1080].

The third assignment of error [Tr. fol. 1080] is based on the action of the court in receiving in evidence, over defendant's objection, a letter sent by defendant to the Stoddard Incorporating Company, authorizing said company to proceed with the incorporation of the Panama Development Company, and giving them the names of two persons to be used as directors. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1080].

The fourth assignment of error [Tr. fol. 1081] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to the Stoddard Incorporating Trust Company for the purpose of ascertaining what steps would be necessary to reduce the capital stock of the Panama Development Company from one million dollars to one hundred thousand dollars. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1081].

The fifth assignment of error [Tr. fol. 1082] was based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to the Panama Development Company, advising said company of the necessary steps to be taken to legally change the articles of incorporation of an Arizona company. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1083].

The sixth assignment of error [Tr. fols. 1083-1085] is based on the action of the court in receiving in evi-



dence, over defendant's objection, a letter addressed to E. A. Lynn, Los Angeles, California, signed by one Santiago de Guardia, in which the writer requests said E. A. Lynn to remove his name from the advisory board of the Panama Development Company, because of the misrepresentations as to the status of the Panama Development Company, and the status of the writer with the Panama Development Company. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1085].

The seventh assignment of error [Tr. fol. 1086] is based on the action of the court in permitting the witness John Redpath to testify who authorized him to sign an itemized statement showing the resources and liabilities of the Panama Development Company. Defendant objected to the introduction of this testimony and excepted to the action of the court in receiving it [Tr. fol. 1086].

The eighth assignment of error [Tr. fol. 1086] is based on the action of the court in receiving, over defendant's objection, a statement showing the resources and liabilities of the Panama Development Company, May 26th, 1911. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1087].

The ninth assignment of error [Tr. fol. 1088] is based on the action of the court in receiving in evidence, over defendant's objection, a stock book of the Panama Development Company, showing the list of stockholders of said company. The defendant ob-

jected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1089].

The tenth assignment of error [Tr. fols. 1090-1091] is based on the action of the court in receiving in evidence, over the defendant's objection, an itemized statement of the resources and liabilities of the Panama Development Company May 26th, 1911. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1091].

The eleventh assignment of error [Tr. fols. 1091-1102] is based on the action of the court in receiving in evidence, over defendant's objection, the minutes of May 16th, 1911, of the meeting of the board of directors of the Panama Development Company. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1102].

The twelfth assignment of error [Tr. fol. 1102] is based on the action of the court in receiving in evidence, over defendant's objection, a demand note in favor of the defendant for \$23,000, signed by the Panama Development Company. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1103].

The thirteenth assignment of error [Tr. fols. 1103-1107] is based on the action of the court in receiving in evidence, over the defendant's objection, a letter addressed to the Los Angeles Stock Exchange, ex-

plaining the nature of the business of the Panama Development Company, and giving a list of the different persons of official capacity in said company. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1107].

The fourteenth assignment of error [Tr. fols. 1107-1108] is based on the action of the court in permitting the introduction of testimony attempting to show the defendant's connection with the Tropical Products Company. The defendant objected to the introduction of this testimony and excepted to the action of the court in receiving it [Tr. fol. 1108].

The fifteenth assignment of error [Tr. fols. 1109-1110] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to the Stoddard Incorporating Trust Company, containing instructions for the incorporation of a company entitled "Panama Sugar Estates Limited." The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1111].

The sixteenth assignment of error [Tr. fol. 1111] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to the Stoddard Incorporating Company containing instructions concerning an amendment of the articles of incorporation of the Panama Development Company. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1112].



The seventeenth assignment of error [Tr. fols. 1112-1117] is based on the action of the court in receiving in evidence, over defendant's objection, a statement in the nature of a prospectus for the Panama Sugar Estates Limited, showing different officers of the company and the nature and purposes of such company. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1117].

The eighteenth assignment of error [Tr. fols. 1117-1119] is based on the action of the court in receiving in evidence, over the objection of the defendant, a grant deed to certain real property situated in the county of Los Angeles, California. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1120].

The nineteenth assignment of error [Tr. fols. 1120-1122] is based on the action of the court in receiving in evidence, over defendant's objection, a contract between the Panama Development Company and Elizabeth Leach of Los Angeles, for the sale of 1,000 acres of Panamanian government lands. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1122].

The twentieth assignment of error [Tr. fols. 1123-1124] is based on the action of the court in receiving in evidence, over defendant's objection, a contract between the Panama Development Company and Elizabeth Leach for the clearing of 1,000 acres of sugar

land. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1124].

The twenty-first assignment of error [Tr. fols. 1124-1132] is based on the action of the court in receiving in evidence, over defendant's objection, a mortgage by the Panama Development Company in favor of Sadie Waldon, mortgaging certain real property to said Sadie Waldon, as security for a loan of \$1100.00. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1132].

The twenty-second assignment of error [Tr. fols. 1132-1134] is based on the action of the court in receiving in evidence, over defendant's objection, an agreement by the Panama Development Company to sell 2,000 acres of Panamanian government land to Frances B. Haldeman, Riverside, California. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1135].

The twenty-third assignment of error [Tr. fols. 1135-1136] is based on the action of the court in receiving in evidence an agreement between the Panama Development Company and Frances B. Haldeman for the clearance of 1,000 acres of sugar land. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1136].

The twenty-fourth assignment of error [Tr. fols. 1137-1139] is based on the action of the court in re-

ceiving in evidence, over defendant's objection, a grant deed by Frances B. Haldeman and Robert J. Haldeman, to the Panama Development Company, of certain property in the county of Riverside, California. The defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1139].

The twenty-fifth assignment of error [Tr. fols. 1139-1141] is based on the action of the court in receiving in evidence, over defendant's objection, an agreement between the Panama Development Company and E. D. Ryan, employing E. D. Ryan as general manager of said company in the republic of Panama. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it.

The twenty-sixth assignment of error [Tr. fols. 1141-1142] is based on the action of the court in receiving in evidence, over defendant's objection, a telegram by the defendant to the Panama Development Company, with instructions to address all mail to San Francisco. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1142].

The twenty-seventh assignment of error [Tr. fol. 1142] is based on the action of the court in receiving in evidence, over the objection of the defendant, a letter addressed to Mr. Redpath containing general instructions concerning the business of the company. Defendant objected to the introduction of this evidence



and excepted to the action of the court in receiving it [Tr. fol. 1143].

The twenty-eighth assignment of error [Tr. fol. 1143] is based on the action of the court in receiving in evidence, over the defendant's objection, a letter addressed to Mr. Redpath discussing the bills and general business of the company. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1146].

The twenty-ninth assignment of error [Tr. fol. 1146] is based on the action of the court in receiving in evidence, over defendant's objection, an unaddressed telegram concerning financial difficulties with one Amiel. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1146].

The thirtieth assignment of error [Tr. fol. 1147] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned telegram addressed to Panamano, Los Angeles, stating that arrest would follow unless certain matters were attended to immediately. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1147].

The thirty-first assignment of error [Tr. fol. 1147] is based on the action of the court in receiving in evidence, over defendant's objection, a telegram addressed to the defendant, signed "R," demanding that defendant return immediately to Los Angeles. Defendant objected to the introduction of this evidence

and excepted to the action of the court in receiving it [Tr. fol. 1148].

The thirty-second assignment of error [Tr. fol. 1148] is based on the action of the court in receiving in evidence, over defendant's objection, a telegram addressed to John Redpath, signed "L," informing Redpath that everything possible was being done to raise necessary funds. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1149].

The thirty-third assignment of error is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned telegram addressed "Panamano," referring to a certain action by one Amiel unless matters settled in full. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1150].

The thirty-fourth assignment of error is based on the action of the court in receiving in evidence, over defendant's objection, a telegram addressed "Panamano," signed "Amiel," threatening immediate action unless settlement made. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1150].

The thirty-fifth assignment of error [Tr. fol. 1151] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to one Redpath, discussing the contents of a cable from one Smith, together with instructions to Redpath to reduce the price of the company's lands

and see if he cannot make some quick sales to promising prospects. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1152].

The thirty-sixth assignment of error [Tr. fols. 1153-1155] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to one Redpath informing the said Redpath that the writer was unable to raise any money and instructing the said Redpath as to what steps to take in the event creditors of the company became too insistent. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1155].

The thirty-seventh assignment of error [Tr. fol. 1155] is based on the action of the court in receiving in evidence, over defendant's objection, a telegram addressed to John Redpath, signed "L," informing said Redpath that arrangements had been made to secure \$5,000 and that Redpath could draw on "L" for \$2,000. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1156].

The thirty-eighth assignment of error [Tr. fol. 1156] is based on the action of the court in receiving in evidence, over defendant's objection, a telegram addressed to J. G. Lyman, signed "Redpath," concerning resignation of one Smith, and the receipt of a letter and wire from one Guardia. Defendant objected to the introduction of this evidence and ex-



cepted to the action of the court in receiving it [Tr. fol. 1157].

The thirty-ninth assignment of error [Tr. fol. 1157] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned telegram addressed to J. G. Lyman, requesting that he appear at once at conference concerning demands on contracts. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1157].

The fortieth assignment of error [Tr. fol. 1158] is based on the action of the court in receiving in evidence, over defendant's objection, a telegram addressed to Redpath, signed "L," requesting the presence of Redpath and Lynn, together with contracts and notes of corporation, for the purpose of raising money. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1158].

The forty-first assignment of error [Tr. fol. 1159] is based on the action of the court in receiving in evidence, over defendant's objection, a telegram addressed to J. G. Lyman, signed Redpath, informing Lyman that Lynn and Redpath were leaving tonight and to arrange meeting by wire. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1159].

The forty-second assignment of error [Tr. fol. 1159] is based on the action of the court in receiving in evidence, over the defendant's objection, a telegram addressed to Redpath, signed "L," arranging for meet-

ing at St. Francis Hotel at 9:30 in the morning. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1160].

The forty-third assignment of error [Tr. fol. 1160] is based on the action of the court in receiving in evidence, over the defendant's objection, an unsigned telegram addressed to Panamano, Los Angeles, containing information that one Amiel will not accept draft and that the writer is unable to get away without help. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1161].

The forty-fourth assignment of error [Tr. fol. 1161] is based on the action of the court in receiving in evidence, over defendant's objection, a cable message addressed "Lyman," signed "Smith," containing two words, "Must answer." Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1161].

The forty-fifth assignment of error [Tr. fols. 1162-1169] is based on the action of the court in receiving in evidence, over defendant's objection, three checks on the National Bank of California, in favor of the Howard Automobile Company, for \$1,000, \$250.00, and \$144.90, respectively, signed by John Redpath, vice-president, L. R. Smith, secretary, together with one check in favor of the First National Bank, \$200.00, signed John Redpath, vice-president; one check in favor of John G. Lyman, \$1,000, signed John Redpath, vice-president, L. R. Smith, secretary; one

check in favor cash, \$100.00, signed John Redpath, vice-president, E. A. Lynn, assistant secretary, and endorsed J. G. Lyman; eight checks in favor of John G. Lyman for \$500.00, \$1,000.00, \$100.00, \$500.00, \$274.00, \$227.90, \$227.90 and \$300.00, respectively, and signed by John Redpath, vice-president, L. R. Smith, secretary, and three of the checks being signed by E. A. Lynn, assistant secretary; one check for \$1,000 in favor of "Ourselves," signed by L. R. Smith, secretary, and endorsed Panama Development Company by John Redpath, vice-president. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1169].

The forty-sixth assignment of error [Tr. fol. 1170] is based on the action of the court in receiving in evidence, over defendant's objection, a prospectus of the Panama Sugar Estates Limited, setting forth the price at which shares of the company's stock might be purchased. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1171].

The forty-seventh assignment of error [Tr. fols. 1172-1174] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Paul A. Hauser and signed Panama Development Company, by L. R. Smith, commenting upon the profits to be made by said Hauser if he would take advantage of the opportunity to purchase Panamanian government lands as offered by the Panama Development Company. Defendant ob-



jected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1174].

The forty-eighth assignment of error [Tr. fols. 1174-1177] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to Mrs. Dr. Steele, requesting of said Mrs. Dr. Steele that she inform the writer who it was that told her the Panama Development Company was the greatest graft of the century. The letter informed the said Steele that her informant had misled her and that the Panama Development Company had \$50,000.00 paid up cash, and was entirely responsible, and the lands offered for sale were in every way desirable. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1177].

The forty-ninth assignment of error [Tr. fols. 1177-1179] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to one Hellwig concerning hotel prices at David, climate at Chirique, cost of clearing and planting 20 acres of land, and the best means of going to Panama. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1179].

The fiftieth assignment of error [Tr. fols. 1179-1182] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Mrs. O. Hellwig, signed Panama Development Company, by L. R. Smith, discussing with said

Hellwig conditions of the climate of the Canal Zone and in the province of Chirique, the markets in Panama, and railroads and fertility of soil, and the anticipated raise in price of land. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1182].

The fifty-first assignment of error [Tr. fol. 1182] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to John Redpath, informing the said Redpath that one Mrs. J. M. Chowlwell has a new bungalow which she will exchange for Panama government lands, and the terms and conditions under which she would make the exchange. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1182].

The fifty-second assignment of error [Tr. fol. 1184] is based on the action of the court in receiving in evidence, over defendant's objection, a letter signed Thomas O'Rourke, containing the information that the writer is unable to make a payment due on his purchase of land and would like to transfer his interests in some land and corporate stock for some Panama lands. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1185].

The fifty-third assignment of error [Tr. fol. 1185] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to one N. R. Bell, expressing the writer's disappointment in the contents of a letter of the 2nd

inst. and informing the said Bell to immediately make some arrangements for the disposal of the property referred to. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1186].

The fifty-fourth assignment of error [Tr. fol. 1186] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to Jacob Van de Grift, informing the said Grift of the conditions under which the writer would sell the Haldeman property if the sale could be made this week. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1187].

The fifty-seventh assignment of error [Tr. fol. 1193] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to F. L. Anderson, signed by E. A. Lynn, promising to reserve 20 acres in block 29 for one Funiman. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1194].

The fifty-ninth assignment of error [Tr. fols. 1195-1201] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter on letter head of the Panama Development Company, containing the statement as to the prices at which Panama government lands could be purchased, and the general adaptability and fertility of Panama lands, together with a statement of the future worth of said lands and a general statement of conditions to



be met at that time in acquiring said lands. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1201].

The sixty-first assignment of error [Tr. fols. 1205-1207] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Panama Development Company and signed N. Campbell, acknowledging the receipt of an offer for exclusive agency for the sale of land in the province of Cocle, together with the information that the writer had friends who would purchase many thousand acres of these lands; also a request for information concerning the nature of the organization of the Panama Development Company. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1207].

The sixty-second assignment of error [Tr. fol. 1210] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to one N. Campbell, containing an answer to a letter of August 29th from Campbell, informing the said Campbell that the company is an Arizona corporation with \$100,000 capitalization, \$50,000 cash paid in; also a statement that a three page circular letter was enclosed giving details of conditions of the company and the lands it had for sale. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fols. 1210-1211].

The sixty-third assignment of error [Tr. fols. 1210-

1211] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to Messrs. French and Company, informing said French & Company that in accordance with conversation had with them, 10,000 acres of sugar land, situated in Cocle province, had been set aside 30 days for them to sell. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1211].

The sixty-fourth assignment of error [Tr. fols. 1211-1213] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to R. Spotford French, acknowledging receipt of a letter concerning business arrangements made and informing the said French regarding the price of government land, and the transportation facilities in Panama. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1213].

The sixty-fifth assignment of error [Tr. fols. 1213-1215] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Mr. Lyman, signed "R. Spotford French," commenting upon the fact that the writer would like to have some references to show customers, and that he could receive no definite information anywhere as to the financial status of the company, the writer suggesting that if he be permitted to handle details as he saw fit that he could get the business. Defendant objected to the introduction of this evidence and excepted

to the action of the court in receiving it [Tr. fol. 1215].

The sixty-sixth assignment of error [Tr. fols. 1215-1216] is based on the action of the court in receiving in evidence an unsigned letter addressed to R. Spotford French, informing the said French that his suggestions concerning the way to handle sales are impractical. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1216].

The sixty-seventh assignment of error [Tr. fol. 1217] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed "Panama Development Company," signed "R. Spotford French," asking the company to reserve 4,000 acres for 30 days, as the writer had interested parties almost sure to take 5,000 acres and pay one-half down. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1217].

The sixty-eighth assignment of error [Tr. fol. 1218] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to R. Spotford French, informing said French that land had been reserved according to his request. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1218].

The sixty-ninth assignment of error [Tr. fol. 1219] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed



to the Panama Development Company, signed "R. Spotford French," requesting the company to reserve a block on the railroad until August 1st. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1219].

The seventieth assignment of error [Tr. fol. 1219] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to R. Spotford French, informing said French that block 51 had been reserved for him. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1220].

The seventy-first assignment of error [Tr. fol. 1220] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Panama Development Company, and signed R. Spotford French, informing the company that in running ads making comparisons concerning the price of land in Panama it would be better to comment upon the climate. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1221].

The seventy-second assignment of error [Tr. fol. 1221] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Panama Development Company, signed "R. Spotford French," discussing with the company as to the best method of advertising lands. Defendant objected to the introduction of this evidence and excepted

to the action of the court in receiving it [Tr. fol. 1222].

The seventy-third assignment of error [Tr. fol. 1223] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to R. Spotford French, informing said French that inasmuch as he didn't like the way the company advertised he could do the advertising himself and they would allow him a commission of 30%. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1223].

The seventy-fourth assignment of error [Tr. fol. 1224] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to John G. Lyman, signed "R. Spotford French," asking said Lyman what guarantee he could give syndicate that lands would be planted and to what. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1224].

The seventy-fifth assignment of error [Tr. fol. 1225] is based on the action of the court in receiving in evidence, over defendant's objection, unsigned letter addressed to R. Spotford French, informing said French of the cost of clearing and planting lands to sugar and how much money would be necessary to put up if syndicate wanted to make arrangements for planting. Defendant objected to introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1226].

The seventy-sixth assignment of error [Tr. fols. 1226-1228] is based on the action of the court in permitting the introduction of the testimony of the witness G. E. Wagner as to what one Redpath told him concerning sale of land to an American colony; that they were exclusive agents Panama government; railroad would be completed in about six week; what kind of crops were grown, and a conversation had with said Redpath concerning transfer of a 9-room house at Lawndale in exchange for land. Defendant objected to the introduction of this testimony and excepted to the action of the court in receiving it [Tr. fol. 1228].

The seventy-seventh assignment of error [Tr. fol. 1229] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to J. E. Wagner, signed Panama Development Company, by G. L. Maynard, requesting the said Wagner to appear at the office of the company, as they had a proposition to make to him concerning the exchange of his property. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1230].

The seventy-ninth assignment of error [Tr. fol. 1232] is based on the action of the court in receiving in evidence, over defendant's objection, a contract with William Randolph Hearst, to insert advertising matter in the Los Angeles Examiner, signed "L. R. Smith. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1233].



The eightieth assignment of error [Tr. fols. 1233-1235] is based on the action of the court in receiving in evidence, over defendant's objection, advertising matter addressed to investors, signed "Panama Development Company." Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1235].

The eighty-first assignment of error [Tr. fol. 1235] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Thomas O'Rourke, signed "Panama Development Company, L. R. Smith, secretary," advising said O'Rourke that the company would accept payments for the land in two installments of \$12.50 each; also informing said O'Rourke that the company had some very fine land in the province of Chirique which was selling rapidly and urged the said O'Rourke to make his application for land at once. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1237].

The eighty-second assignment of error [Tr. fol. 1237] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Thomas O'Rourke, signed "Panama Development Company, L. R. Smith," informing said O'Rourke that an application blank was enclosed per request. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1237].

The eighty-third assignment of error [Tr. fol. 1238] is based on the action of the court in receiving in evi-

dence, over defendant's objection, evidence consisting of Panama Development Company form of application for land. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1239].

The eighty-fourth assignment of error [Tr. fol. 1239] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed "Thomas O'Rourke," signed "Panama Development Company, by L. R. Smith," informing the said O'Rourke that maps of the Panama country in general and an application blank was enclosed with request that said O'Rourke fill out same and forward with remittance. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1240].

The eighty-fifth assignment of error [Tr. fol. 1240] is based on the action of the court in receiving in evidence, over defendant's objection, an envelope postmarked "Los Angeles, California," addressed "Thomas O'Rourke, San Fernando, California." Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1240].

The eighty-sixth assignment of error [Tr. fol. 1241] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Thomas O'Rourke, signed "Panama Development Company, L. R. Smith," acknowledging the receipt of money from the said O'Rourke and promising to plant 10 acres for the said O'Rourke, and take the expense

out of the first two crops, promising the said O'Rourke that the land would be planted as soon as provisional title is received from the government; also informing the said O'Rourke that the price of land would be raised the latter part of the month. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1242].

The eighty-seventh assignment of error [Tr. fol. 1243] is based on the action of the court in receiving in evidence, over defendant's objection, an application for land, addressed to Panama Development Company and signed "Thomas O'Rourke," said O'Rourke informing the company that he was sending them \$12.50 with request that the company purchase 10 acres of government land in the republic of Panama for the writer. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1244].

The eighty-eighth assignment of error [Tr. fol. 1244] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed "Thomas O'Rourke," signed "Panama Development Company, by L. R. Smith," acknowledging the receipt of \$15.00 and promising to make a good selection of land for the said O'Rourke. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1245].

The ninetieth assignment of error [Tr. fol. 1248] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed



to Thomas O'Rourk, signed "Panama Development Company, by L. R. Smith," informing said O'Rourk of the mailing to him of a contract covering 60 acres of timber land in Veragua. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it.

The ninety-first assignment of error [Tr. fol. 1249] is based on the action of the court in receiving in evidence, over defendant's objection, a letter signed "Thomas O'Rourk," containing a statement by the writer that signed agreement was returned as requested and asking for information of some physician recently returned from Panama. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1250].

The ninety-second assignment of error [Tr. fol. 1250] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Thomas O'Rourk, signed "Panama Development Company, by L. R. Smith," acknowledging receipt of \$12.50 due on first contract. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1251].

The ninety-third assignment of error [Tr. fol. 1251] is based on the action of the court in receiving in evidence, over defendant's objection, a letter signed "Thomas O'Rourk," the writer discussing the general terms of a letter to him informing him terms under which the writer could purchase Panama land. Defendant objected to the introduction of this evidence

and excepted to the action of the court in receiving it [Tr. fol. 1253].

The ninety-fifth assignment of error [Tr. fol. 1256] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Frederick L. Anderson, signed "Panama Development Company, by L. R. Smith," enclosing a map of Panama, showing where a large tract of land had recently been sold to an American colony, and suggesting to Anderson that as the price of lands would soon advance he had better get in an early application. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1257].

The ninety-sixth assignment of error [Tr. fol. 1257] is based on the action of the court in receiving in evidence, over defendant's objection, a letter to F. L. Anderson, signed "Panama Development Company, by E. A. Lynn," informing said Anderson that 20 acres in block 9 would be reserved for Mr. Funiman. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1258].

The ninety-seventh assignment of error [Tr. fol. 1259] is based on the action of the court in receiving in evidence, over defendant's objection, a blank form of agreement for the purchase of land with a heading "Panama Development Company Land Agreement." Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1263].

The ninety-eighth assignment of error [Tr. fol. 1263] is based on the action of the court in receiving in evidence, over defendant's objection, an unsigned letter addressed to Michael Werner, informing the said Werner that requested papers relative to government land in Panama were being sent him per his request. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1264].

The ninety-ninth assignment of error [Tr. fols. 1264-1269] is based on the action of the court in receiving in evidence, over defendant's objection, five letters of different dates, all addressed to Michael Werner, and signed "Panama Development Company, by L. R. Smith." The first letter [Tr. fol. 1265] gives the said Werner information and data concerning Panama lands, with an offer of 10% commission on any business the said Werner might send the company. The second letter [Tr. fol. 1266] acknowledges receipt of two checks for \$25.00 each. The third letter [Tr. fol. 1267] informs the said Werner of the mailing to him of land agreement signed and sealed, covering 10 acres of Panama lands, together with receipt for \$25.00; also information that \$2.50 had been placed to his credit by the company. The fourth letter [Tr. fol. 1268] informs the said Werner that maps showing Panama and Agua Dulce lands were being sent him; also a suggestion that the said Werner send his application at once. The fifth letter [Tr. fol. 1269] informs the said Werner that his application for Panama lands had been duly forwarded to Panama. De-



fendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1269].

Assignment of error No. 100 [Tr. fols. 1269-1270] is based on the action of the court in receiving in evidence, over defendant's objection, an application for land, signed Michael Werner, enclosing \$25.00, with a request that 10 acres of government land in Panama be purchased for the writer. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1270].

Assignment of error No. 101 [Tr. fol. 1270] is based on the action of the court in receiving in evidence, over defendant's objection, a letter signed "Michael Werner," requesting Panama Development Company to return money paid it because of sickness in the family of the writer. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1271].

! Assignment of error No. 102 [Tr. fol. 1271] is based on the action of the court in receiving in evidence, over defendant's objection, 176 land agreements, issued by the Panama Development Company. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1272].

Assignment of error No. 103 [Tr. fol. 1272] is based on the action of the court in receiving in evidence, over defendant's objection, 114 applications made to the Panama Development Company for land, and signed by the respective applicants. Defendant

objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1272].

Assignment of error No. 104 [Tr. fol. 1272] is based on the action of the court in receiving in evidence, over defendant's objection, 170 documents entitled "Powers of Attorney," which powers of attorney were numbered, dated and signed by the respective applicants for land, and witnessed by the employees of the Panama Development Company. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1273].

Assignment of error No. 107 [Tr. fol. 1274] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Paul A. Hauser, signed "Panama Development Company, L. R. Smith, secretary," offering to exchange Panama land for some Long Beach property owned by said Hauser. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1275].

Assignment of error No. 117 [Tr. fol. 1279] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Panama Development Company, signed "Stefan Hladish," informing the company that the writer would like to have 100 acres of land for raising stock. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1280].

Assignment of error No. 118 [Tr. fol. 1280] is based on the action of the court in receiving in evidence, over defendant's objection, a letter addressed to Stefan Hladish, signed Panama Development Company, by L. R. Smith, informing said Hladish as to climate and conditions in Panama, and the best place to get land for raising stock. Defendant objected to the introduction of this evidence and excepted to the action of the court in receiving it [Tr. fol. 1282].

Assignment of error No. 119 [Tr. fol. 1282] is based on the action of the court in permitting the witness Stefan Hladish to answer a question concerning a letter received by said witness through the mail, and the introduction of said letter in evidence. Defendant objected to the introduction of this testimony and evidence and excepted to the action of the court in receiving it [Tr. fol. 1282].

Assignment of error No. 148 [Tr. fol. 1301] is based on the action of the court in instructing the jury as follows:

"Replying to the question which you have propounded to me, I instruct you that the mailing of a letter without the fraudulent intent would be no crime. If, however, the evidence satisfies you beyond a reasonable doubt that the fraudulent intent was in the mind of the defendant before the mailing of any one of the letters mentioned in the indictment, then, as to the count in which the letter is set forth, the fraudulent intent is sufficiently established."

## BRIEF OF ARGUMENT.

---

### POINT ONE

The trial court erred in receiving, over defendant's objection, books, records and papers which had been unlawfully taken from defendant's possession by officers of the United States government. The evidence complained of under this point is fully set out in assignments of errors 1 to 6 inclusive [Tr. fols. 1076-83], 8 to 13 inclusive [Tr. fols. 1786-1103], 15 to 40 inclusive [Tr. fols. 1108-1159], 57 [Tr. fol. 1193], 59 to 75 inclusive [Tr. fols. 1195-1225], 77 [Tr. fol. 1229], 79 to 86 inclusive [Tr. fols. 1232-1243], 88 [Tr. fol. 1263], 90 to 93 inclusive [Tr. fols. 1248-1251], 95 to 104 inclusive [Tr. fols. 1256-1272], and 107-117 inclusive [Tr. fols. 1274-1279].

An examination of these assignments of error will disclose the prejudicial character of the evidence herein complained of. It is not disputed by the government that the various papers and documents, referred to in the assignment of errors, were taken from the possession and control of the defendant against his will and without his permission, and without any warrant or authority of law. The introduction in evidence over the objection of the defendant of his private papers and documents obtained without warrant or authority of law is in violation of the spirit and letter of the fourth and fifth amendments to the federal Constitution. The fourth amendment provides as follows:

“The right of the people to be secure in their persons, houses, papers and effects, against un-



reasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.”

The fifth amendment provides, in part:

“Nor shall he be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law,” etc.

In *Boyd v. United States*, 116 U. S. 116, the meaning, purpose and object of these two amendments are set forth with such clearness and force that we beg the indulgence of the court for quoting somewhat liberally from the opinion of Mr. Justice Bradley.

In that case an information was filed by the United States District Attorney in a case of seizure and forfeiture of property against thirty-five cases of plate glass, seized by the collector as forfeited to the United States under the internal revenue law of June 22, 1874. That act provided that any owner, importer, etc., who shall, with intent to defraud the revenue, make, or attempt to make, any entry of imported merchandise by any fraudulent or false invoice, affidavit, letter, or paper, shall be fined not exceeding \$5,000.00 or to imprisonment not exceeding two years, or both. The government charged that said goods had been imported into the United States in violation of law. The plaintiffs in error entered a claim for the goods and pleaded that they had not become forfeited. On the trial it became important to show the quantity

and value of the goods contained in twenty-nine cases previously imported. For this purpose the district attorney offered in evidence an order made by the district judge under section 5 of said act, directing that notice, under the seal of the court, be given to the claimants, requiring them to produce the invoice of the twenty-nine cases. The claimants, in obedience to the notice, but objecting to its validity and to the constitutionality of the law, produced the invoice. They objected to its reception in evidence on the ground that in a suit for the forfeiture, no evidence could be compelled from the claimants themselves; and also that the statute, so far as it compels the production of evidence to be used against the claimants, was unconstitutional and void. The evidence was received and the jury found a verdict for the government, condemning the thirty-five cases of glass which were seized, and judgment of forfeiture was given. The judgment was affirmed by the Circuit Court, from which court it was carried to the Supreme Court on writ of error. The order requiring the claimants to produce the invoices desired by the government for the purpose of examination and making copies thereof was based on section 5 of the act of June 22, 1874, which act provided, among other things, that "if the claimants should fail to produce the books, invoices or papers called for in obedience to such notice, the allegations stated in the motion for the order should be taken as confessed, unless the failure to produce should be explained to the satisfaction of the court," and also provided that such book, invoice or paper could be offered

in evidence by the district attorney on behalf of the government. It appears that the act of 1874, under which said notice was issued, was an amendment of certain prior acts of 1863 and 1867, covering the same subject, but which were much more stringent with respect to the search and seizure of books and papers for the use of the government than the act of 1874. The Supreme Court (Mr. Justice Bradley), after quoting the fourth and fifth amendments to the federal Constitution, said:

“But in regard to the fourth amendment, it is contended that, whatever might have been alleged against the constitutionality of the acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection, because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so; but it declares that if he does not produce them the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production; for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man’s house and searching amongst his papers, are wanting; and to this extent the proceeding under the act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory

production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the fourth amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient and effects the sole object and purpose of search and seizure.

"The principal question, however, remains to be considered. Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an 'unreasonable search and seizure' within the meaning of the fourth amendment to the Constitution? Or is it a legitimate proceeding? It is contended by counsel for the government that it is a legitimate proceeding sanctioned by long usage and the authority of judicial decision. No doubt long usage, acquiesced in by the courts, goes a long way to prove that there is some plausible ground or reason for it, in the law or in the historical construction of the law favorable to such usage. \* \* \* But we do not find any long usage, or any contemporary construction of the Constitution which would justify any of the acts of Congress now under consideration. \* \* \* The search for and seizure of stolen or forfeited goods, or goods liable to duties, and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*."



Mr. Justice Bradley then refers to the contemporary history of controversies on the subject of searches and seizures both in this country and in England at and prior to the adoption of the fourth amendment. He quotes with approval the language of Lord Damden in *Entrick v. Carrington*, 19 Howell's State Trials, 1029, as follows:

“Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye by the laws of England cannot be guilty of a trespass, yet, where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.’”

The *Boyd* case is affirmed and quoted with approval in the recent case of *United States v. Weeks*, 132 U. S. 383.

#### POINT TWO.

The court erred in giving the instruction to the jury set out in assignment of error 148 [Tr. fol. 1301], as follows:

“Replying to the question which you have propounded to me, I instruct you that the mailing of a letter without the fraudulent intent would be no crime.

If, however, the evidence satisfies you beyond a reasonable doubt that the fraudulent intent was in the mind of the defendant before the mailing of any one of the letters mentioned in the indictment, then, as to the count in which that letter is set forth, the fraudulent intent is sufficiently established."

The error in this instruction plainly appears when a certain question of one of the jurors is taken into consideration, which question brought forth this instruction from the court. The question of the juror referred to is contained in assignment of error 148 [Tr. fol. 1301], as follows:

"Juror Brownstein: We would like to be enlightened in regard to the alleged intent of the defendant to defraud. Are we to consider his intent at the time of organizing the Panama Development Company, or at the time the several letters in the indictment were written and mailed, or any subsequent time?"

In other words, it is apparent from the question asked by the jury they wanted to know if they, the jury, believed the defendant formed the guilty intention to defraud for the first time *after* the organization of the Panama Development Company, could they find the defendant guilty if he subsequently formed a guilty intention at the time the several letters in the indictment were written and mailed, or at any subsequent time? That this instruction, given by the court to the jury in answer to the question of the juror, Brownstein, is not the law is clearly apparent from the following authorities:

In the case of *Durland v. United States*, 161 U. S. 314, the promoters were selling fictitious bonds or security that had no existence, and there was no intention of giving the purchasers anything of value for their money. The Supreme Court said in this case:

“If the testimony had shown that this Provident Company, and the defendant as its president, had entered in good faith upon that business, believing that out of the moneys received they could, by investment or otherwise, make enough to justify the promised return, no conviction could be sustained no matter how visionary might seem the scheme. \* \* \* The charge is that in putting forth this scheme it was not the intention of the defendant to make an honest effort for its success, but that he resorted to this form and pretense of a bond without a thought that he or the company would ever make good its promises. It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this statute was passed.”

One of the principles established by the *Durland* case, *supra*, is that the bad faith must be found in the antecedent scheme itself, not entered into during the subsequent execution of the scheme.

In the case of a bogus medical institute, the court said:

“While the fraudulent character of the scheme, as executed, is necessarily charged, and must be established by proof, conviction cannot rest on the fact that the scheme is fraudulent in operation for

the statutory offense requires specific intention on the part of the accused to defraud. (*Durland v. United States*, 161 U. S. 313.) In other words, however fraudulent in tendency or fact the scheme may appear to be, neither the scheme nor its execution is punishable under the statute, unless the evidence establishes as well the essential ultimate fact charged as the violation—that it was devised and carried out by the accused with intent to defraud. \* \* \*

*Hibbard v. United States*, 72 Fed. Rep. 66.

It must be remembered that an essential part of the defendant's scheme to defraud as charged in the indictment [Tr. fols. 5-40] consisted of his scheme to organize the Panama Development Co.; that defendant would advertise, etc., to persons intended to be defrauded under name of said corporation; that said corporation had a paid up capital of \$50,000.00; that said corporation was the agent of the Panamanian government for the sale of Panama lands. [Tr. fol. 7.]

The indictment charges that the Panama Development Co. was organized as a corporation on or about May 1, 1911 [Tr. fol. 5] and the government introduced evidence at the trial showing that said corporation came into existence April 29, 1911. [Tr. fol. 212.]

The jury found the defendant guilty on the first count of the indictment. [Tr. fol. 189.] The letter contained in the first count is dated Aug. 28, 1911. [Tr. fol. 14.] The letters set out in the remaining five counts are dated as follows: Second count, Aug.



22, 1911 [Tr. fol. 18]; third count, July 24, 1911 [Tr. fol. 27]; fourth count, June 6, 1911 [Tr. fol. 31]; fifth count, July 11, 1911 [Tr. fol. 36]; sixth count, Aug. 25, 1911 [Tr. fol. 40].

As the jury found the defendant not guilty on the remaining five counts of the indictment it necessarily follows that the jury believed that the defendant had not conceived an intention to defraud until at a time sometime prior to the mailing of the letter set out in the first count and subsequent to the date of letter mailed next prior to the letter in the first count which date was Aug. 25, 1911, the date of the letter contained in the sixth count. [Tr. fol. 40.]

Confronted with these facts it is apparent that the government failed to prove the essential allegations of the indictment.

## II.

The judgment should be reversed and a new trial granted plaintiff-in-error.

Respectfully submitted,

PAUL W. SCHENCK,

RICHARD KITTRELLE,

*Attorneys for Plaintiff-in-Error.*

621 Homer Laughlin Bldg., Los Angeles, Cal.



No. 2746.

---

IN THE  
United States  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

---

John Grant Lyman,  
*Plaintiff in Error,*  
*vs.*  
United States of America,  
*Defendant in Error.*

---

BRIEF OF DEFENDANT IN ERROR.

---

**Filed**

SEP 7 - 1916

F. D. Monckton

Clerk

ALBERT SCHOONOVER,  
*United States Attorney.*





IN THE  
United States  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

John Grant Lyman,

*Plaintiff in Error,*

*vs.*

United States of America,

*Defendant in Error.*

**BRIEF OF DEFENDANT IN ERROR.**

Plaintiff in error makes two points in support of his appeal herein:

POINT ONE.

"The introduction in evidence over the objection of the defendant of his private papers and documents obtained without warrant or authority of law is in violation of the spirit and letter of the fourth and fifth amendments to the federal Constitution." (Brief, page 40.)

POINT TWO.

“The court erred in giving the instruction to the jury set out in assignment of error 148 [Tr. fol. 1301], as follows: ‘Replying to the question which you have propounded to me, I instruct you that the mailing of a letter without the fraudulent intent would be no crime. If, however, the evidence satisfies you beyond a reasonable doubt that the fraudulent intent was in the mind of the defendant before the mailing of any one of the letters **mentioned in the indictment**, then, as to the count in which that letter is set forth, the **fraudulent intent is sufficiently established.**’ ” (Brief, pages 45, 46.) Which instruction was given in reply to a question by a juror, as follows:

“Juror Brownstein: We would like to be enlightened in regard to the alleged intent of the defendant to defraud. Are we to consider his intent at the time of organizing the Panama Development Company, or at the time the several letters in the indictment were written and mailed, or any subsequent time?”

**ARGUMENT.**

---

POINT ONE.

It appears from the portions of the transcript referred to on page 40 of the brief that the documents introduced in evidence were not the private papers of the defendant, but were part of the files and records of the Panama Development Company, a corporation; and it is not contended that the defendant may invoke the protection of the fourth and fifth amendments to

prevent the introduction of corporate documents tending to criminate him.

But, if such objection to the introduction of these documents had been available to defendant at a proper time, his objection, made for the first time when they were offered in evidence, came too late. Defendant had every opportunity, for more than two years, to make a "seasonable application for their return." *Weeks v. United States*, 232 U. S. 398.

Of the *Weeks* case, counsel in their brief say: "The *Boyd* case is affirmed and quoted with approval in the recent case of *United States v. Weeks*, 132 (232) U. S. 383." (Brief, page 45.)

True, the court in the *Weeks* case did ~~not~~ quote with approval from the opinion in the *Boyd* case, 116 U. S. 616, as to the purpose and scope of the fourth and fifth amendments, and held that the accused's rights thereunder had been violated because, first: papers seized in that case were the private papers of the accused, and second: the accused had made timely and seasonable demand for their return. On page 395 of the opinion in the *Weeks* case the court reaffirms and quotes with approval the doctrine that "The underlying principle obviously is that the court, when engaged in trying a criminal cause, will not take notice of the manner in which witnesses have possessed themselves of papers, or other articles of personal property, which are material and properly offered in evidence," laid down by the New York Court of Appeals in *People v. Adams*, 176 N. Y. 351, and approved in *Adams v. New York*, 192 U. S. 585. After so quoting, the court in the *Weeks* case says:

"This doctrine thus laid down by the New York Court of Appeals and approved by this court, that a court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent testimony, has the sanction of so many state cases that it will be impracticable to cite or refer to them in detail. Many of them are collected in the note to *State v. Turner*, 136 Am. St. Rep. 129, 135, *et seq.* After citing numerous cases the editor says: 'The underlying principle of all these decisions obviously is, that the court, when engaged in the trial of a criminal action, will not take notice of the manner in which a witness has possessed himself of papers or other chattels, subjects of evidence, which are material and properly offered in evidence: *People v. Adams*, 176 N. Y. 351, 98 Am. St. Rep. 675, 68 N. E. 636, 63 L. R. A. 406. Such an investigation is not involved necessarily in the litigation in chief, and to pursue it would be to halt in the orderly progress of a cause, and consider incidentally a question which has happened to cross the path of such litigation, and which is wholly independent thereof.' "

#### POINT TWO.

The court instructed the jury, in part, as follows [Tr. Vol. 1, pp. 181-2-3]:

"The defendant in this case is charged with having placed and caused to be placed in the United States Postoffice in the city of Los Angeles, state of California, to be sent and delivered by the postoffice establishment of the United States, certain letters, for the purpose of executing a scheme to defraud alleged to have been previously devised by him. This scheme is



fully set forth and described in the indictment, which has been read to you, and which you will have with you in the jury room, and which, therefore, need not be recited here.

“The indictment contains six counts.

“All charge the same scheme to defraud, but each alleges the deposit in the United States mail of a letter different from those set forth in the other counts.

“To constitute the offense charged in the first count, three things are necessary: First, that the defendant devised the scheme therein described; second, that said scheme was one to defraud; third, that said defendant, for the purpose of executing said scheme, placed, or caused to be placed, in the postoffice at Los Angeles, California, to be sent and delivered by said postoffice establishment, the letter in said count described.

“If you are satisfied from the evidence, beyond a reasonable doubt, of the existence of the three constituents which I have enumerated, you will find the defendant guilty as charged in said first count. If, however, the evidence fails to so satisfy you of said constituents, or either of them, you will find the defendant not guilty as charged in the first count. \* \* \*

“The section of the Criminal Code under which this prosecution was brought denounces as a crime the mailing or causing to be mailed of a letter in the execution of a scheme to defraud.

“The evil sought to be remedied is always important in determining the meaning of a statute. It is common knowledge that nothing is more alluring than the expectation of receiving large returns on small invest-

ments. Eagerness to take the chances of large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than is parted with appeals to the cupidity of all.

“In the light of this the statute must be read, and so read it includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. Thus, it will also be seen, that one of the significant facts is the intent and purpose to defraud, without which there can be no conviction.

“The court further instructs you, that, if the representations intended to be made as alleged in the indictment were false, but defendant honestly believed them true, then said representations would not be fraudulent.”

Portions of these instructions are quoted from *Durland v. United States*, 161 U. S. 313, cited by counsel.

The instruction complained of advised the jury that the offense consisted in the mailing of a letter with “the fraudulent intent,” without which there would be no crime, and that this intent must be then present in the mind of the accused. “The fraudulent intent,” the jury were fully advised by the instructions of the court, must be found to be an intent to further the scheme described in the indictment.

Argument is made that the verdict, convicting on the first count and acquitting on the remaining five counts, demonstrates that the instruction misled the jury to find the defendant guilty on the first count,

because the jury believed that the defendant had “the fraudulent intent” on August 28, 1911, when the letter counted on in the first count was mailed, but did not have such intent on August 25, 1911, nor prior thereto, when the other indictment letters were mailed.

This is more ingenious than convincing, and shows to what extremities we may be driven to account for the verdicts of juries. (There is a case where the jury found the defendant guilty on the first count in an indictment charging him with taking one package from a mail pouch and acquitted him on several other counts for taking other packages from the pouch at the same time. Counsels’ argument could be carried out to cover that case.)

No claim is made that the evidence was insufficient to warrant a verdict of guilty on all the counts, nor is any fact or circumstance pointed out as affording any basis for the supposed belief by the jury that the defendant had formed his fraudulent intent between August 25th and August 28th, 1911.

Defendant had a fair trial and was fortunate to be convicted upon but one count in the indictment.

No reason is suggested why substantial justice has not been done in this case.

Respectfully submitted,

ALBERT SCHOONOVER,  
*United States Attorney.*





---

---

IN THE  
**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

George Leib,	<i>Appellant,</i>	} No. .... <b>2747</b>
vs.		
O. P. Halligan and United States of America,	<i>Appellees.</i>	

---

In the Matter of the Application of George Leib  
for a Writ of Habeas Corpus.

---

UPON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE WESTERN  
DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION

---

**Brief of Appellees**

---

CLAY ALLEN,  
United States Attorney,  
GEORGE P. FISHBURNE,  
Assistant United States Attorney,  
*Attorneys for Appellees.*

310 Federal Building, Seattle, Washington.

Filed  
MAR 11 1930  
F. B. Monahan  
Clerk



IN THE  
**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

George Leib,	<i>Appellant,</i>	} No. ....
vs.		
O. P. Halligan and United States of America,	<i>Appellees.</i>	

In the Matter of the Application of George Leib  
for a Writ of Habeas Corpus.

UPON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE WESTERN  
DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION

HON. EDWARD E. CUSHMAN.

**Brief of Appellees**

STATEMENT OF FACTS.

The defendant was indicted under section 150  
of the Federal Penal Code of 1910, reading as fol-  
lows:

“\* \* \* or whoever shall have in his pos-  
session or custody, except under authority from  
the Secretary of the Treasury or other proper  
officer, any obligation or other security made or

executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same."

The defendant was indicted on five counts, the first of which is in substance as follows:

"\* \* \* did knowingly and feloniously have in his possession, with intent to use the same and thereby to defraud some person or persons to the grand jurors unknown, said possession not being under authority from the Secretary of the Treasury of the United States, or from any other proper officer, a certain obligation made in part after the similitude of an obligation issued under the authority of the United States, \* \* \* being then and there made by attaching and fastening together back to back, two notes purporting to have been issued by The Augusta Insurance & Banking Co., Georgia, of the denomination of Ten Dollars each, \* \* \* by the use of paste and other substance and means to the grand jurors unknown; that the said obligation \* \* \* is on the one side thereof in words and figures as follows, to-wit:

'The	GEORGIA	10
AUGUSTA INSURANCE & BANKING CO.		
10		
No. 26 B	Augusta	
	10 March 1860	
Will pay TEN DOLLARS to bearer		
on demand. No. 26	B	
Ten	X	

Robert Walton, Cashr. Wm. M. D. Antigna, Prest.'



and on the reverse side there of \* \* \* in words and figures as follows, to-wit:

'The GEORGIA 10  
AUGUSTA INSURANCE & BANKING CO.  
10

No. 1298 A

Augusta

8 June, 1860

Will pay TEN DOLLARS to bearer  
on demand. No. 26 B

Ten

X

Robert Walton, Cashr. Wm. M. D. Antigna, Prest.'  
and which obligation \* \* \* was then and there in form, color, size, and in the manner and style of display of the printing and engraving thereon, and in their general appearance, made and intended to be made after the similitude of an obligation issued under the authority of the United States, that is to say, after the similitude of a United States legal tender note of the denomination of ten dollars, he, the said George Leib, then and there well knowing said obligation not to be a lawful and genuine obligation issued under the authority of the United States and with the intent of the said George Leib to use the said obligation by uttering the same as and for a lawful obligation issued under the authority of the United States \* \* \* "

The other four counts of the indictment are in substantially the same language, and differ only in alleging that the similtude is to another kind of monetary obligation of the United States of America.

The jury found the defendant guilty, and he was sentenced on all five counts of the indictment, and is now serving under such sentence.

### ABSENCE OF PHRASE "THE UNITED STATES OF AMERICA"

The petitioner in his brief lays emphasis on the fact that nowhere upon these notes does there appear the words or phrase "The United States of America," and urges that on that account the instrument could not be said to be after the similtude of any obligation of the United States. The statute does not say that this is required. All that it demands is that a man shall not have in his possession any "obligation or other security made or executed in whole or in part after the similtude of any obligation issued under authority of the United States." To be within the provisions of the statute it is not necessary that the obligation should have the phrase "United States of America" or any other language used on United States notes, provided the general appearance of the obligation sufficiently resembles the United States security to deceive a person of ordinary prudence. This point is covered in the cases of *United States v. Webber*, 210 Fed. 973, and *United States v. Sprague*, 48 Fed. 828, wherein it was held that it was not a necessary element of such

offense that the fraudulent obligation or security should purport on its face to be an obligation or security issued under the authority of the United States.

The statute does not say that there must be a counterfeit, and even if it did, it would not necessarily follow that this phrase would have to appear on the face of the obligation.

## NECESSITY FOR ALTERATION OF THE INSTRUMENT

The petitioner seems to have the impression that to make a man guilty under this act he must have altered or changed in some manner the printing and engraving on the obligation. This was not held necessary even under the old act which provided "every person who has in his possession any obligation or other security engraved and printed after the similitude \* \* \*" Thus, notice the cases of *United States v. Stevens* and *United States v. Webster*, both of which are cited and quoted below in this brief. In neither of these cases was there any evidence that there had been any alteration in the printing and engraving on the instruments; and both of them were cases in which the obligations under consideration were notes of state banks, valid

at the time of their issuance. The statute does not say that there must be such alteration; it merely says the obligation must be made or executed in whole or in part after the similitude of an obligation of the United States, and necessarily means made in any manner. The defendant was not being tried for forgery, and so it was not necessary that he, himself, should have made the alteration.

### POSSESSION PROHIBITED IN ALL CASES

It is not in evidence in this case, and the court cannot take judicial notice of the fact that Georgia Bank Notes and Confederate Bills in the likeness and similitude of obligations of the United States are in the possession of curio dealers for the purpose of sale, and so this is a question that the court cannot consider in this case. If this were the case and it were discovered by the authorities that the curio dealers were using their trade as a cloak to pass off on the public such worthless confederate and old state bank notes as being genuine obligations and securities of the United States, we have no doubt that a court would refuse to grant a non-suit and that the jury would return a verdict of guilty against them.

An officer has to use his common sense in the enforcement of the law and there are every day



technical violations of the letter of various state and United States laws, and yet no grand jury would indict and no jury would convict in such instances. The law clearly means that a person is prohibited from having in his possession obligations forbidden in the Act with the intent to negotiate them as genuine.

### CASES ON ALL FOURS SUSTAINING US.

The appellant contends that there are no cases similar to this one and yet grants that there have been rulings in similar cases on a demurrer to the indictment. If an alleged defect in an indictment is not deemed by the court sufficient to sustain a demurrer, certainly the same defect cannot be taken advantage of by the accused by a petition for a writ of habeas corpus after the trial is over and while he is serving his sentence. If the cases in point are all those wherein the objections were raised by demurrer, it shows that this is the proper way to urge such a point of law as the appellant endeavored to raise in the lower court by a petition for a writ of habeas corpus. If the appellant had offered the same objections to his detention by a demurrer to the indictment or a demurrer to the evidence, or by motion for judgment notwithstanding the verdict, and the court had overruled him, his remedy, if any,

would have been to appeal to the Circuit Court of Appeals, and he cannot cure such a mistake by a petition for a writ of habeas corpus. We have no doubt that the substance of the appellant's petition was called to the attention of the trial court, and if it were not, it should have been, and so this question is *res adjudicata* and the decision of the court and jury cannot be reversed by a writ of habeas corpus. The writ of habeas corpus was not intended to be a second writ of review; if it were, litigation would be interminable.

Some of the most able judges in the United States have already passed upon the points raised in this petition and decided them in favor of the government.

In the case of *United States v. Sprague*, 48 Fed. 828, it was held that,

“To constitute the offense it is not necessary that the instrument should purport to be an obligation of the United States, or bear such a likeness thereto as to deceive experts or cautious men; and that it is sufficient if it is calculated to deceive a sensible and unsuspecting man of ordinary observation and care, dealing with a man supposed to be honest.”

and the court says on pages 829-830,

“The object of this statute evidently was to

make it unlawful for any person to have in his possession without proper authority, and with intent to sell or otherwise use the same, any obligation or security, whether purporting to be but not in fact issued under the authority of the United States, or purporting to be or in fact made or issued by any individual or any public or private corporation, engraved and printed after the similitude of a genuine obligation or security of the United States."

The case of *United States v. Stevens*, 52 Fed. 120, was one arising under the old Act, and we call the court's attention to the statute quoted in the opinion. Although the old statute used the words "engraved and printed after the similitude," the court held that,

"The fact that a note was originally issued by a duly authorized state bank, and that it was a legal note at the time of its issuance, does not, after it has become utterly worthless by the insolvency of the bank, exempt the holder of it from prosecution, under section 5430 of the Revised Statutes, if he has it in possession with intent to sell or otherwise use it, and pass it as a genuine note or obligation of the United States."

and on pages 120-121 the court uses the following language:

"The indictment in this case is under the following provision of section 5430 of the Revised

## Statutes of the United States:

‘Every person \* \* \* who has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security engraved and printed after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same, \* \* \* shall be punished (in the manner prescribed in the statute.)’

The evidence before the court, at present, shows that the note or obligation which the defendant is charged with having had in his possession, with intent to sell or otherwise use the same, was a note issued by a regularly chartered state bank, but which at the time defendant is alleged to have had in his possession the note in question was utterly insolvent and its notes worthless.

\* \* \* The object of the provision of the statute under which this indictment is framed is manifestly to preserve the integrity of the national treasury and bank note currency, and to prevent the imposition on the public of worthless notes or obligations of any kind purporting to be the genuine obligations of the United States. It seems to the court that the fact that the note in question was originally issued by a duly authorized bank, and that it was a legal note at the time of its issuance, does not, after it has become utterly worthless by the insolvency of the bank, exempt the holder of it from prosecution, if he has it in possession with intent to sell or otherwise use it, falls within



the mischief intended to be prevented by the statute. 'To constitute the offense, it is not essential that the fraudulent note or obligation should on its face purport to be an obligation of the United States.' *U. S. v. Williams*, 14 Fed. Rep. 551."

In the case of *United States v. Fitzgerald*, 91 Fed. 374,

"There was found in the defendant's possession a paper purporting to be a certificate for 100 shares of the capital stock of the Denver Mining Company, of the par value of \$1,000. Said certificate, as to its size, quality of paper, and style of printing, resembles a United States bond for the sum of \$1,000, and upon the face of it there are printed above the purported certificate, the following words and figures:

\$1,000		\$1,000
	The	
	UNITED STATES	
Number	\$1,000	Letter
		A.
ONE THOUSAND DOLLARS.'		

The paper also has a heavy green border and scroll work resembling somewhat the ornamentation of United States bonds."

The court held that the defendant was guilty under the Act, though the obligation was that of a private corporation, and on page 375-376 uses the following language:

“Now, the similitude must be in such a degree as to furnish a resemblance so near to the government obligations or securities that it could be used to deceive a person of ordinary intelligence, who is acting with ordinary care, in a business transaction. The resemblance is sufficient for the purpose if you believe that it would probably deceive a person taken unawares, in dealing with a person whom he believed was acting honestly. If it could be so used against a person of that kind, when unsuspecting or unwary, as to deceive him, and be effectual to commit a fraud, then it would be in the similitude as intended by this statute. Of course, the government claims no exclusive right to each and all of the details of its printing or engraving. As to the use of the words ‘United States,’ or the green border, or any of the words singly or by themselves, the government does not claim an exclusive right to the use; but the paper is to be considered as an entirety, and if there is such an imitation on the face of the paper, when you consider the kind of paper, the size, and the color, and the general style of it, that you can say that that paper is in the similitude of a security or obligation of the United States, and so well executed as to deceive an intelligent person in a business transaction, then it is sufficiently in the similitude of a government obligation to warrant you in finding that fact against the defendant in this case; otherwise not.”

In the case of *United States v. Webber*, 210 Fed. 973, the court will observe from the language of the opinion, at page 975, that the indictment was

almost in the same language as that in this case, and that the notes were state notes pasted back to back exactly as in this case, and that the court, after carefully reviewing all of the authority, upholds the indictment. The court says that the authorities bearing on this question cannot be reconciled; but it seems to us that the cases cited as being against us did not arise under the same state of facts: Thus, in the case of *United States v. Barrett*, 111 Fed. 369, the bill in question was the fac similie of a confederate bill, and there was no pasting together of two bills; in the case of *United States v. Connors*, 111 Fed. 734, there were two state bank notes, but they were not pasted together; and the same thing is true of the case of *United States v. Pitts*, 112 Fed. 522. But even if these cases were against us, they were all decided under the old act, and the weight of authority is in our favor.

Judge Rudkin, in *United States v. Webber*, 210 Fed. 973, at page 976, uses the following language:

“I am further of opinion that the true rule of construction, and the rule supported by the weight of authority, is the rule adopted and followed by the judges of this district. Under that rule it is not necessary that the fraudulent obligation or security should purport on its face to be an obligation or security issued under the authority of the United States. Nor is it necessary

that the similarity or resemblance should be so great as to deceive experts, bank officers, or cautious men. It is sufficient if the fraudulent obligation bear such a likeness or resemblance to any of the genuine obligations or securities issued under the authority of the United States, as is calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest. If the fraudulent obligation is of that character, the offense is made out, and whether such a similarity or resemblance exists is, in ordinary cases, a question of fact for the jury."

The reasoning of the court is consistent with the language of the statute. The statute says, "any obligation or other security," and does not limit it to those issued by any particular person or corporation. Again, the statute says, "made or executed in whole or in part after the similitude." According to the appellant's contention the words "in part" should be discarded; but it is the duty of the court to give effect to all of the language of a statute.

The chief reliance of the appellant is in the case wherein Gross S. Edison was released by writ of corpus from the Kansas penitentiary. Judge Pollock apparently rendered no written decision. In this case it does not appear that the United States Attorney resisted the petition, and so it could not be used as a precedent in the face of the other cases to



the contrary decided in this district. We are unable to find any cases decided under the last statute holding against our position, and so we have the authority and better reasoning in our favor. We therefore urge that the lower court should be sustained.

Respectfully submitted,

CLAY ALLEN,  
United States Attorney,

GEORGE P. FISHBURNE,  
Assistant United States Attorney,  
*Attorneys for Appellees.*



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

COUNTY OF HAWAII,  
Plaintiff in Error,  
vs.  
HALAWA PLANTATION, LIMITED, a Corpora-  
tion,  
Defendant in Error.

**Transcript of Record.**

Upon Writ of Error to the Supreme Court of the  
Territory of Hawaii.

Filed

MAY 3 1911

F. D. Monckton,





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

COUNTY OF HAWAII,

Plaintiff in Error,

vs.

HALAWA PLANTATION, LIMITED, a Corporation,  
tion,

Defendant in Error.

---

**Transcript of Record.**

---

**Upon Writ of Error to the Supreme Court of the  
Territory of Hawaii.**

---



# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Affidavit of W. H. Beers.....	311
Amended Praecipe for Transcript on Writ of Error Returnable in U. S. Circuit Court of Appeals .....	327
Assignment of Errors on Return to Writ of Error in Supreme Court, Territory of Hawaii .....	3
Assignment of Errors on Return to Writ of Error Returnable in U. S. Circuit Court of Appeals .....	312
Bond on Writ of Error Returnable in Supreme Court, Territory of Hawaii .....	9
Certificate of Clerk, Supreme Court, Territory of Hawaii, to Transcript of Record, etc.....	334
Certificate of Reporter to Transcript of Testi- mony, etc. ....	294
Citation on Writ of Error Returnable in U. S. Circuit Court of Appeals.....	324
Complaint .....	14
Court's Charge to Jury.....	290
Defendant's Answer and Demand for Jury Trial	26
Defendant's Demurrer to Plaintiff's Complaint	22

	Index.	Page
TESTIMONY ON BEHALF OF PLAINTIFF		
—Continued:		
BLUET, P. W. P.....		184
Cross-examination .....		189
KAHINO.....		105
Cross-examination .....		115
Redirect Examination .....		125
KOOLAU .....		47
Cross-examination .....		65
Redirect Examination .....		80
MASON, ARTHUR .....		267
PUNA, JOE .....		128
Cross-examination .....		137
SNIFFEN, JOHN .....		146
Cross-examination .....		151
SOUTHWORTH, E. A. ....		85
Cross-examination .....		103
VON ARNSWALDT, ALEXANDER ....		209
Cross-examination .....		211
Redirect Examination .....		218
Recross-examination .....		219
WATT, GEO. C.....		190
Cross-examination .....		202
WIGHT, ATKINS J.....		29
Cross-examination .....		32
Recalled .....		182
Recalled .....		221
Cross-examination .....		236
Undertaking to Return Original Exhibits.....		333



Index.	Page
Verdict in Circuit Court.....	298
Writ of Error in Supreme Court, Territory of Hawaii .....	11
Writ of Error Returnable in U. S. Circuit Court of Appeals .....	320









*In the Supreme Court of the Territory of Hawaii.*

(STAMPED \$2.00)

HALAWA PLANTATION, LIMITED, a Corporation,

Plaintiff and Defendant in Error,

vs.

COUNTY OF HAWAII,

Defendant and Plaintiff in Error.

**Petition for Writ of Error [Returnable in Supreme Court, Territory of Hawaii].**

To the Honorable A. G. M. ROBERTSON, Chief Justice, and the Honorable E. M. WATSON, and the Honorable R. P. QUARLES, Associate Justices, of the Supreme Court of the Territory of Hawaii:

The petition of the County of Hawaii, defendant and plaintiff in error herein, respectfully shows:

That on or about the 25th day of November, 1914, in the Circuit Court of the Third Judicial Circuit of the Territory of Hawaii, a jury empanelled rendered and returned a verdict in favor of the plaintiff in the cause of the Halawa Plantation, Limited, a Corporation, Plaintiff, vs. County of Hawaii, Defendant.

That pursuant to the verdict rendered and returned as aforesaid a judgment in favor of the said plaintiff was, on the 3d day of December, 1914, duly entered in the said Circuit Court of the Third Judicial Circuit of the Territory of Hawaii.

That during the hearings had upon questions of law raised as to the pleadings in the cause aforesaid, and during the course of the trial of the said cause, certain rulings and errors of law were made by the said Circuit Court against the said defendant, to which said rulings counsel for said defendant duly excepted.

That the said defendant deems itself aggrieved by the verdict of the jury rendered and returned as aforesaid, and by the [1\*] rulings and judgment rendered by the said Circuit Court, and by other errors of law then and there had, all of which more particularly appear in the assignment of errors hereto annexed and made a part hereof and filed herewith.

That execution on the said judgment has not at this date been duly satisfied and six months has not yet elapsed since the rendition of the said judgment.

WHEREFORE, your petitioner, the defendant and plaintiff in error herein, respectfully prays:

That a writ of error issue out and under the seal of this Court directed to the clerk of the said Circuit Court of the Third Judicial Circuit of the Territory of Hawaii, commanding him, the said clerk, to send and duly certify to this Court all records, pleadings, motions, demurrers, exhibits, files, affidavits, minutes, judgment, transcripts of testimony and proceedings taken and filed in the said cause, to the end that this Court may view the same and correct any and all errors, if any there be, therein.

---

\*Page-number appearing at foot of page of original certified Record.

Dated at Hilo, Hawaii, this 20th day of March, 1915.

COUNTY OF HAWAII,

Petitioner,

By (Signed) WM. H. HEEN,

Deputy County Attorney of the County of Hawaii.

[Endorsed]: Rec'd \$6.00. Filed April 17, 1915, at 8:40 A. M. J. A. Thompson, Clerk. [2]

*In the Supreme Court of the Territory of Hawaii.*

HALAWA PLANTATION, LIMITED, a Corporation,

Plaintiff and Defendant in Error,

vs.

COUNTY OF HAWAII,

Defendant and Plaintiff in Error.

**Assignment of Errors [on Return to Writ of Error in Supreme Court, Territory of Hawaii.]**

Now comes the County of Hawaii, defendant and plaintiff in error herein, by W. H. Heen, Deputy County Attorney, and says that in the record and proceedings in a case lately pending in the Circuit Court of the Third Judicial Circuit of the Territory of Hawaii, entitled Halawa Plantation, Limited, Plaintiff, vs. County of Hawaii, Defendant, there are divers and manifest errors, and that the said defendant and plaintiff in error now makes and presents the following assignment of errors upon which it relies before this Court for relief as follows:

1. That the said Circuit Court erred in overruling the demurrer interposed by the said defendant to

the declaration of the said plaintiff.

2. That the said Circuit Court erred in overruling the motion of the said defendant for nonsuit.

3. That the said Circuit Court erred in overruling the motion of said defendant for a directed verdict in its favor.

4. That the said Circuit Court erred in giving instruction No. 1 of said plaintiff's request for instructions.

5. That the said Circuit Court erred in giving instruction No. 2 of said plaintiff's request for instructions. [3]

6. That the said Circuit Court erred in giving instruction No. 3 of said plaintiff's request for instructions.

7. That the said Circuit Court erred in refusing to give instruction No. 5 of said defendant's request for instructions.

8. That the said Circuit Court erred in refusing to give instruction No. 6 of said defendant's request for instructions.

9. That the said Circuit Court erred in refusing to give instruction No. 7 of said defendant's request for instructions.

10. That the said Circuit Court erred in failing to instruct the jury upon the question of contributory negligence.

11. That the said Circuit Court erred in overruling the said defendant's motion for a new trial.

The said defendant and plaintiff in error herein further says that to all of the rulings made as



aforesaid exceptions were duly made by its counsel.

WHEREFORE, the said defendant and plaintiff in error herein respectfully prays that the verdict and judgment rendered, returned, and entered in the cause aforesaid on account of the manifest errors aforesaid, be reversed, vacated, and set aside, and that the said cause be remanded to the said Circuit Court of the Third Judicial Circuit for such disposition as may be just and proper in the premises.

Dated at Hilo, Hawaii, March 20th, 1915.

COUNTY OF HAWAII,

Petitioner,

By (Signed) WM. H. HEEN,

Deputy County Attorney for the County of Hawaii.

[Endorsed]: Filed April 17, 1915, at 8:40 A. M.  
J. A. Thompson, Clerk. [4]

*In the Supreme Court of the Territory of Hawaii.*

HALAWA PLANTATION, LIMITED, a Corporation,

Plaintiff and Defendant in Error.

vs.

COUNTY OF HAWAII,

Defendant and Plaintiff in Error.

**Notice of Issuance of Writ of Error [Returnable in  
Supreme Court, Territory of Hawaii.**

To Halawa Plantation, Limited, a Corporation,  
Plaintiff and Defendant in Error:

You will please take notice that the original assignment of errors, of which the foregoing is a

copy, has been filed with the clerk of the Supreme Court of the Territory of Hawaii; that a writ of error in the above-entitled cause has issued from the said Supreme Court to the Circuit Court of the Third Judicial Circuit of the Territory of Hawaii, and that the said defendant and plaintiff in error will move the said Supreme Court for an order setting a date for the hearing of the said writ of error.

Dated at Hilo, Hawaii, April 17, 1915.

(Signed) WM. H. HEEN,  
Deputy County Attorney of Counsel, for Defendant  
and Plaintiff in Error.

[Endorsed]: Filed April 17, 1915, at 8:40 A. M.  
J. A. Thompson, Clerk. [5]

*In the Supreme Court of the Territory of Hawaii.*  
(STAMPED \$2.00.)

HALAWA PLANTATION, LIMITED, a Corporation,  
Plaintiff and Defendant in Error,

vs.

COUNTY OF HAWAII,

Defendant and Plaintiff in Error.

**Summons [for Service of Papers on Return to  
Writ of Error, in Supreme Court, Territory of  
Hawaii].**

To the High Sheriff of the Territory of Hawaii, or  
His Deputy; the Sheriff of the County of  
Hawaii or His Deputy:

**YOU ARE COMMANDED** to make service upon

Halawa Plantation, Limited, a Corporation of the annexed petition for Writ of Error, Assignment of Errors, and Notice of Issuance of Writ of Error in the above-entitled cause, and summon it to appear before the Supreme Court of the Territory of Hawaii within twenty (20) days to answer the annexed petition for a Writ of Error and Assignment of Errors of the County of Hawaii, the plaintiff in error herein.

And have you then there this Writ with full return of your doings thereon.

WITNESS the Honorable Chief Justice of the Supreme Court of the Territory of Hawaii, at Honolulu, city and county of Honolulu, this 17th day of April, 1915.

[Seal] (Signed) J. A. THOMPSON,  
Clerk.

Received April 19th, 1915, at 9:30 A. M.

(Signed) H. K. MARTIN,  
Deputy Sheriff. [6]

[Endorsed]: No. 846. Supreme Court, Territory of Hawaii. Halawa Plantation, Limited, a Corporation, Plaintiff and Defendant in Error, vs. County of Hawaii, Defendant and Plaintiff in Error. Summons Issued at 8:40 o'clock A. M., April 17, 1915. (Signed) J. A. Thompson, Clerk. Returned at 1:10 o'clock P. M., April 21, 1915. (Signed) J. A. Thompson, Clerk.

[Endorsed]: No. 846. In the Supreme Court of the Territory of Hawaii, Halawa Plantation, Ltd., a Corporation, Plaintiff and Defendant in Error, vs. County of Hawaii, Defendant and Plaintiff in Error. Petition for Writ of Error, Assignment of Errors, Notice of Issuance of Writ of Error, and Summons. Filed and Issued April 17, 1915, at 8:40 A. M. J. A. Thompson, Clerk. Returned April 21, 1915, at 1:10 P. M. J. A. Thompson, Clerk. W. H. Beers, County Attorney, Wm. H. Heen, Dep. County Attorney for County of Hawaii, Deft. and Plaintiff in Error.

Received at 9:30 A. M., April 20th, A. D. 1915.  
W. P. Jarrett, High Sheriff.

**[Return of Service of Papers on Writ of Error, in  
Supreme Court Territory of Hawaii.]**

Served the within Summons on the Halawa Plantation, Limited, a corporation, therein named as plaintiff and defendant in error, at Honolulu, city and county of Honolulu, Territory of Hawaii, this 20th day of April, A. D. 1915, by delivering to F. M. Swanzy, President of the said Halawa Plantation, Limited, a corporation, a certified copy hereof and of the Petition for Writ of Error, Assignment of Errors and Notice of Issuance of Writ of Error hereto annexed and at the same time showing him the original.

Dated at Honolulu, city and county of Honolulu, Territory of Hawaii, this 20th day of April, A. D. 1915.

(Signed) PATRICK GLEASON,  
Deputy High Sheriff, Territory of Hawaii. [7]



War Revenue Stamps.

*In the Supreme Court of the Territory of Hawaii.*

(STAMPED \$2.00.)

Paid by M. F. Scott, April 20, 1915.

HALAWA PLANTATION, LIMITED, a Corporation,

Plaintiff and Defendant in Error,

vs.

COUNTY OF HAWAII,

Defendant and Plaintiff in Error.

**Bond [on Writ of Error Returnable in Supreme Court, Territory of Hawaii].**

KNOW ALL MEN BY THESE PRESENTS: That the County of Hawaii, as principal, and the Hawaiian Insurance and Guaranty Company, as surety, are bound and firmly held unto the Halawa Plantation, Limited, a Corporation, in the penal sum of Eleven Thousand Seven Hundred Twenty-seven Dollars and Seventy-nine Cents (\$11,727.79) with interest thereon at the rate of six per cent per annum from the 3d day of December, 1914, for the payment of which, well and truly to be made, they do bind themselves and their successors and assigns, jointly and severally, firmly by these presents.

Signed with their names and sealed with their seals on the 8th day of April, 1915.

The condition of the foregoing obligation is such that in a cause lately pending in the Circuit Court of the Third Judicial Circuit of the Territory of Hawaii, wherein the obligee was plaintiff and the obligor was defendant, the said obligee, on the 3d day

of December, 1914, obtained judgment against the said obligor in the sum of Eleven Thousand Seven Hundred Twenty-seven Dollars and Seventy-nine (\$11,727.79) cents, with interest thereon at the rate of six per cent per annum from the said 3d day of December, 1914, and that the said obligor has sought to obtain a writ of error in the said cause in the Supreme Court of the Territory of Hawaii, and that the said obligor has undertaken to pay the [8] said judgment in the said cause, together with the said interest thereon, in case of failure to sustain the said writ of error;

Now, therefore, if the said obligor shall fail to sustain the said writ of error, and shall fail to pay the said judgment in the said cause, together with the said interest thereon, then this obligation shall be of full force and effect, otherwise null and void.

COUNTY OF HAWAII.

By (Signed) DAVID K. EWALIKO,  
(Signed) E. K. KANEHAILUA,  
(Signed) J. A. M. OSORIO,  
(Signed) SAMUEL KAUHANE,  
(Signed) J. PRITCHARD,  
(Signed) JULIAN R. YATES,  
(Signed) HENRY J. LYMAN,

Members of the Board of Supervisors of the County of Hawaii.

(Seal) Attest: (Signed) JOHN K. KAI,  
Clerk of the County of Hawaii.

(Seal) HAWAIIAN INSURANCE AND  
GUARANTY CO., LTD.

By (Signed) H. B. MARINER,  
Treasurer.

[Endorsed]: No. 846. In the Supreme Court of the Territory of Hawaii. Halawa Plantation, Ltd., a Corporation, Plaintiff and Defendant in Error, vs. County of Hawaii, Defendant and Plaintiff in Error. Bond. Filed April 17, 1915, at 8:40 A. M. J. A. Thompson, Clerk. [9]

---

*In the Supreme Court of the Territory of Hawaii.*

October Term, 1914.

(STAMPED \$2.00)

HALAWA PLANTATION, LIMITED, a Corporation,  
tion,

Plaintiff and Defendant in Error.

vs.

COUNTY OF HAWAII,

Defendant and Plaintiff in Error.

**Writ of Error [In Supreme Court, Territory of  
Hawaii].**

The Territory of Hawaii: To E. M. Muller, Esquire,  
Clerk Circuit Court, Third Circuit.

Whereas, in an action lately pending before the Circuit Court of the Third Circuit, in which the said Halawa Plantation, Limited, a corporation, was plaintiff, and the said County of Hawaii was defendant, error is alleged to have occurred as appears by the assignment of errors on file in this court, you are commanded forthwith to send up to this court the record and the exhibits filed in said proceedings.

Witness, the Hon. A. G. M. ROBERTSON, Chief Justice of the Supreme Court, at Honolulu, Territory

of Hawaii, this 17th day of April, 1915.

By the Court:

(Signed) J. A. THOMPSON,  
Clerk Supreme Court.

Received the above Writ of Error on the 22d day of April, 1915, at 11:30 o'clock A. M.

[Seal] (Signed) E. M. MULLER,  
Clerk Circuit Court, Third Circuit.

In obedience to the within writ to me directed, I herewith send up the record and all the exhibits filed in said above-mentioned cause.

(Signed) E. M. MULLER,  
Clerk Circuit Court, Third Circuit.

Dated Kailua, Hawaii, May 4th, 1915. [10]

[Endorsed]: No. 846. Supreme Court, Territory of Hawaii. Halawa Plantation, Ltd., Plaintiff and Defendant in Error, vs. County of Hawaii, Defendant and Plaintiff in Error. Writ of Error. Issued at 8:40 o'clock A. M., April 17, 1915. (Signed) J. A. Thompson, Clerk. Returned at 8:35 o'clock A. M., May 11, 1915. (Signed) J. A. Thompson, Clerk.

---

*In the Supreme Court of the Territory of Hawaii.*  
HALAWA PLANTATION, LIMITED, a Corporation,  
tion,

Plaintiff and Defendant in Error,  
vs.

COUNTY OF HAWAII,  
Defendant and Plaintiff in Error.



**Error.**

**APPEARANCE FOR DEFENDANT IN ERROR.**

Now comes Holmes, Stanley & Olson, and hereby enter their appearance as attorneys for Halawa Plantation, Limited, Defendant in Error in the above-entitled cause.

Dated, May 12th, 1915.

(Signed) HOLMES, STANLEY & OLSON,  
Attorneys for Halawa Plantation, Limited, Defendant in Error.

[Endorsed]: No. 846. In the Supreme Court of the Territory of Hawaii. Halawa Plantation, Limited, a Corporation, Pltf. and Deft. in Error, vs. County of Hawaii, Deft. and Pltf. in Error. Appearance for Defendant in Error. Filed May 12, 1915, at 3:35 P. M. Robert Parker, Jr., Assistant Clerk. Holmes, Stanley & Olson, 863 Kaahumanu St., Honolulu, Attorneys for Pltf. and Deft. in Error. [11]

---

*In the Circuit Court, Third Judicial Circuit, Territory of Hawaii.*

October Term, A. D. 1913.

(\$2.00 STAMPS)

HAWAII PLANTATION, LIMITED, a Corporation,  
tation,

Plaintiff,

vs.

COUNTY OF HAWAII,

Defendant.

**Plaintiff's Complaint.**

To the Honorable J. A. MATTHEWMAN, Judge of  
the Circuit Court, Third Judicial Circuit, Terri-  
tory of Hawaii:

Halawa Plantation, Limited, a Corporation, the  
plaintiff herein, complains of the County of Hawaii,  
defendant herein, and for cause of action alleges as  
follows:

**FIRST COUNT.**

(1) The plaintiff herein is now and at all times  
mentioned in this complaint was a corporation duly  
organized and doing business under the laws of the  
Territory of Hawaii and is and was at said times  
the lessee for a term of years of that certain tract  
of land situate in the district of North Kohala, in  
the County and Territory of Hawaii, known as  
Aamakao and that it is now and at all said times  
was carrying on, conducting and operating the busi-  
ness of a sugar plantation on said land and other  
lands in the vicinity thereof. [12]

(2) That the defendant is and at times here-  
inafter mentioned was a body corporate and politic,  
duly organized and existing by virtue of

(Sg.)

E. M. M.  
Clerk.

Laws

Act 30 of the Session ~~Legislature~~ of the  
Territory of Hawaii for the year 1905, en-  
titled "An Act Creating Counties in the Territory  
of Hawaii and providing for the government there-  
of," with full powers to sue and be sued, and to  
appear at courts of law and equity in all respects  
as if it were a natural person; that said defendant

by virtue of said act of the said legislature, is now and at all times hereinafter mentioned has been legally authorized and empowered to make contracts and to employ persons to act as its agents and servants, and to have general powers to open, construct, maintain and close up public streets, highways, roads, alleys, trails and bridges within its boundaries; that by virtue of the powers conferred upon the said defendant, it, said defendant, heretofore, to wit, on or about the 18th day of October, 1912, employed as its agents and servants, certain persons to wit, E. S. Koolau, Kahinu, Analu Kala, Boniface Poe, Naihe Kukui, Joseph Puna and Kahoi Kealoha and by the said employment, its said agents and servants, to wit, the said E. S. Koolau, Kahinu, Analu Kala, Boniface Poe, Naihe Kukui, Joseph Puna and Kahoi Kealoha were authorized to act for and on behalf of the said defendant in the work of repairing, maintaining and constructing a certain public street, highway or road within the jurisdiction and territorial limits of the said defendant, to wit, the highway known as the main Government Kohala Road, running from Mahukona to Niulii in the District of said North Kohala and particularly that portion of the Aamakao section of the said highway lying between Makapala and Halawa. [13]

(3) That the said agents and servants of defendant to wit, E. S. Koolau, Kahinu, Analu Kala, Boniface Poe, Naihe Kukui, Joseph Puna and Kahoi Kealoha, acting for and on behalf of the said defendant as aforesaid and as the agents and servants

of the said defendant and in pursuance of their employment as such agents and servants, heretofore, to wit, on the 18th day of October, 1912, at North Kohala aforesaid and within the jurisdiction and territorial limits of the said defendant and within the jurisdiction of this Honorable Court, did for the purpose of burning certain rubbish on said highway carelessly, negligently and wrongfully, kindle a fire on said highway next adjoining the said land of Aamakao belonging to the plaintiff as aforesaid and did neglect to use proper and reasonable care to prevent the escape of said fire, so that the same extended from said highway to the said adjoining land of the plaintiff and consumed and utterly destroyed certain sugar cane of the plaintiff growing on its said land and covering an area of about ninety acres thereof, to the damage of the plaintiff herein in the sum of \$24,392.44, for which sum, together with interest thereon from the 18th day of October, 1912, the plaintiff herein claims judgment against the defendant.

#### SECOND COUNT.

(1) Plaintiff reiterates and realleges all of the averments in paragraphs one and two of the first count herein contained.

(2) That the said agents and servants of defendant to wit, E. S. Koolau, Kahinu, Analu Kala, Boniface Poe, Naihe Kukui, Joseph Puna and Kohoi Kealoha acting for and on behalf of the said defendant as aforesaid, and as the [14] agents and servants of the said defendant and in pursuance of their employment as such agents and servants



heretofore, to wit, on the 18th day of October, 1912, at North Kohala aforesaid and within the jurisdiction and territorial limits of the said defendant and within the jurisdiction of this Honorable Court did carelessly, negligently and wrongfully kindle a fire on said highway next adjoining the said land of Aamakao belonging to the plaintiff as aforesaid, at a time when by reason of the state of the wind and weather and dryness of the surroundings, it was highly dangerous to light a

(Sg.)  
E. M. M.  
Clerk.

fire, and through the negligence of the defendant

~~plaintiff~~ and its agents and servants, the fire extended from the said highway to the said adjoining land of the plaintiff and consumed and utterly destroyed certain sugar cane of the plaintiff growing thereon and covering an area of about ninety acres thereof, to the damage of the plaintiff herein in the sum of \$24,392.44, for which sum, together with interest thereon from the 18th day of October, 1912, the plaintiff herein claims judgment against the defendant.

### THIRD COUNT.

(1) Plaintiff reiterates and realleges all of the averments in paragraphs one and two of the first count herein contained.

(2) That the said agents and servants of defendant, to wit, E. S. Koolau, Kahinu, Analu Kala, Boniface Poe, Naihe Kukui, Joseph Puna and Kahoi Kealoha, acting for and on behalf of the said defendant as aforesaid and as the agents and servants of the said defendant and in pursuance of their em-

*In the Circuit Court of the Third Circuit, Territory  
of Hawaii.*

Holding Terms at Kailua, County of Hawaii.

(\$2.00 STAMPS)

HALAWA PLANTATION, LIMITED, a Corpora-  
tion,

Plaintiff,

vs.

COUNTY OF HAWAII,

Defendant.

**Term Summons.**

The Territory of Hawaii: To the High Sheriff of  
the Territory of Hawaii, or his Deputy; the  
Sheriff of the County of Hawaii, or his Deputy.

YOU ARE COMMANDED to summon the County  
of Hawaii, Defendant, in case it shall file written  
answer within twenty days after service hereof  
to be and appear before the said Circuit Court at  
the term thereof pending immediately after the  
expiration of twenty days after service hereof; pro-  
vided, however, if no term be pending at such time,  
then to be and appear before the said Circuit Court  
at the next succeeding term thereof, to wit, the Oc-  
tober term thereof, to be holden at Kailua, County  
of Hawaii, on Wednesday, the 22d day of October,  
next, at 10 o'clock, A. M., to show cause why the  
claim of Halawa Plantation, Limited, plaintiff, shall  
not be awarded to it pursuant to the tenor of its an-  
nexed complaint.

And have then and there this writ with full return of your proceedings thereon.

WITNESS the Honorable J. A. MATTHEWMAN, Judge of the [18] Circuit Court of the Third Circuit, at Kailua, Hawaii, this 22d day of July, 1913.

(Signed) J. A. THOMPSON,  
Clerk, Supreme Court, and Ex-officio Clerk Circuit Court, Third Circuit.

Received July 24th, 1913, at 9:00 A. M.

(Signed) SAMUEL K. PUA,  
Sheriff County of Hawaii.

[Endorsed]: Circuit Court, Third Circuit. Halawa Plantation, Limited, a Corporation, Plaintiff, vs. County of Hawaii, Defendant. Term Summons. Issued at 2:42 o'clock P. M., July 22d, 1913. (Signed) J. A. Thompson, Clerk, Supreme Court, and Ex-Officio Clerk Third Circuit. Returned at 5:00 o'clock, P. M., August 2d, 1913. (Signed) E. M. Muller, Clerk.

Territory of Hawaii,  
County of Hawaii,—ss.

I, Samuel K. Pua, Sheriff of the County of Hawaii, do hereby certify and make return that I served the within summons and complaint on the County of Hawaii, Defendant, a body corporate and politic, through William H. Beers, duly elected county attorney for the County of Hawaii, on the 24th day of July, A. D. 1913, at Hilo, Hawaii, by delivering to him a certified copy hereof and of the complaint hereto annexed and at the same time showing him the original as herein directed.

Dated at Hilo, Hawaii, this 24th day of July, A. D. 1913.

(Signed) SAMUEL K. PUA,  
Sheriff, County of Hawaii.

(No. 846. Received and filed in the Supreme Court, May 11, 1915.) [19]

---

*In the Circuit Court of the Third Judicial Circuit  
Territory of Hawaii.*

October Term, 1913.

HALAWA PLANTATION, LIMITED, a Corpora-  
tion,

Plaintiff,

vs.

COUNTY OF HAWAII,

Defendant.

**Defendant's Demurrer to Plaintiff's Complaint.**

**ACTION FOR DAMAGES.**

Comes now the County of Hawaii, defendant above named, by W. H. Beers, its county attorney, and for demurrer to the complaint of the Halawa Plantation, Limited, plaintiff above named, heretofore filed herein, and to each and every count thereof alleges and says:

1.

That the same does not state facts sufficient to constitute a cause of action against the said defendant.

2.

That the said defendant, being a body corporate



and politic, is not liable under the law of the alleged negligent and wrongful acts set forth in the said complaint.

3.

That the function of repairing, maintaining and constructing public streets, roads or highways being a governmental function the said defendant is not liable under the law for any negligent or wrongful acts committed by its servants or employees [20] in respect to the performance of the said function.

4.

That there is no authority by which the said defendant may be held for the alleged negligent and wrongful acts set forth in the said complaint.

5.

That the said complaint is insufficient in that it fails to allege that the said plaintiff, a corporation, was authorized by its board of directors to institute the above-entitled action against the said defendant.

Wherefore, by reason of the matters herein set forth, the said defendant prays judgment of this Court whether it should make any other or further answer unto the said complaint and that it may have its cost.

COUNTY OF HAWAII.

(Signed) By W. H. BEERS,  
County Attorney.

Service of a copy is hereby admitted.

(Signed) HOLMES, STANLEY & OLSON.

[Endorsed]: Original. Circuit Court, Third Circuit, Territory of Hawaii. October Term, 1913. Halawa Plantation, Limited, a Corporation, Plaintiff, vs. County of Hawaii, Defendant. Action for Damages. Defendant's Demurrer to Plaintiff's Complaint. Circuit Court, Third Circuit. Filed August 13th, 1913, 8:00 o'clock A. M. (Signed) E. M. Muller, Clerk. Filed this 11th day of August, A. D. 1913, at 9:30 A. M. (Signed) Robert Parker, Jr., Assistant Clerk, Supreme Court. County of Hawaii, By W. H. Beers, County Attorney.

(No. 846. Received and filed in the Supreme Court May 11, 1915.) [21]

---

*In the Circuit Court of the Third Judicial Circuit,  
Territory of Hawaii.*

October Term, 1913.

HALAWA PLANTATION, LIMITED, a Corporation,  
Plaintiff,

vs.

COUNTY OF HAWAII,

Defendant.

**Joinder in Demurrer.**

Comes now the plaintiff in the above-entitled cause and joins in the demurrer therein filed and says that its complaint and the matters therein contained are sufficient in law for the plaintiff to

have and maintain its action against the defendant.

HALAWA PLANTATION, LIMITED, a  
Corporation,

By Its Attorneys,

(Signed) HOLMES, STANLEY & OLSON.

Dated at Honolulu, Territory of Hawaii, August  
12, 1913.

[Endorsed]: Circuit Court, Third Judicial Circuit,  
Territory of Hawaii. October Term, 1913.  
Halawa Plantation, Limited, a Corporation, Plaintiff,  
vs. County of Hawaii, Defendant. Joinder in  
Demurrer. Circuit Court, Third Circuit. Filed  
August 14th, 1913, 2:50 o'clock P. M. (Signed)  
E. M. Muller, Clerk. Holmes, Stanley & Olson,  
Attorneys for Plaintiff.

(No. 846. Received and filed in the Supreme  
Court, May 11, 1915.) [22]

**[Order Overruling Demurrer to Complaint, etc.]**

*In the Circuit Court of the Third Circuit, Territory  
of Hawaii.*

ACTION FOR DAMAGES.

HALAWA PLANTATION, LIMITED,

Plaintiff,

vs.

COUNTY OF HAWAII,

Defendant.

**Minutes.**

Kailua, Hawaii, January 22d, 1914.

The Court overrules defendant's demurrer to  
plaintiff's complaint and orders that the defendant is

given 30 days within which to file an answer.

(Signed) E. M. MULLER,  
Clerk Circuit Court, Third Circuit, Territory of  
Hawaii. [23]

---

*In the Circuit Court of the Third Judicial Circuit,  
Territory of Hawaii.*

Holding Terms at Kailua, County of Hawaii.

HALAWA PLANTATION, LIMITED, a Corpora-  
tion,

Plaintiff,

vs.

COUNTY OF HAWAII,

Defendant.

**Defendant's Answer and Demand for Jury Trial.**

Comes now the County of Hawaii, the defendant above named, by William H. Heen, Deputy County Attorney of the County of Hawaii, and answering plaintiff's declaration herein denies each and every allegation therein set forth and alleged.

And the said County of Hawaii does hereby demand a trial by jury in the above-entitled cause.

COUNTY OF HAWAII.

(Signed) By WILLIAM H. HEEN,

Deputy County Attorney County of Hawaii.

Dated at Hilo, Feb. 9, 1914.

[Endorsed]: Circuit Court, Third Circuit, Territory of Hawaii. Holding Terms, Kailua, Hawaii. Halawa Plantation, Limited, a Corporation, Plaintiff, vs. County of Hawaii, Defendant. Defendant's



Answer and Demand for Jury Trial. Circuit Court, Third Circuit. Filed February 12th, 1914, 1:05 o'clock P. M. (Signed) E. M. Muller, Clerk. W. H. Beers, County Attorney, W. H. Heen, Dept. Co. Attorney.

(No. 846. Received and filed in the Supreme Court May 11, 1915.) [24]

---

*In the Circuit Court of the Third Judicial Circuit,  
Territory of Hawaii.*

HALAWA PLANTATION, LIMITED,

vs.

COUNTY OF HAWAII.

**Index to Transcript of Evidence.**

**PART I.**

Witness:	Direct Ex.	Cross-ex.	Redirect Ex.
J. Atkins Wight	3- 5	6- 19	
Koolau	21- 39	40- 55	56- 60
E. A. Southworth	61- 78	79- 81	
Kahino	82- 93	94-104	105-107
Joe Puna	108-119	120-128	
John Sniffen	129-133	134-135	

[25]

**[Proceedings Had in Circuit Court, November 18,  
1914.]**

*In the Circuit Court of the Third Judicial Circuit,  
Territory of Hawaii.*

HALAWA PLANTATION, LIMITED,

vs.

COUNTY OF HAWAII.

Wednesday, November 18th, 1914.

10:00 o'clock A. M.

TRANSCRIPT OF EVIDENCE.

APPEARANCES.

HOLMES, STANLEY & OLSON, by C. H.  
OLSON and W. L. STANLEY With H. L.  
HOLSTEIN, for Plaintiff.

WM. H. HEEN, Deputy County Attorney, for  
Defendant.

Mr. OLSON.—I will ask the defendant, through counsel, to admit the allegation appearing, and wherever appearing, in the plaintiff's Bill of Complaint, that the plaintiff herein is a corporation duly organized and doing business under the laws of the Territory of Hawaii.

Mr. HEEN.—That is admitted by the defendant.

Mr. OLSON.—I will also ask the defendant to admit that the plaintiff, at the time when the alleged fire took place, to wit, on the 18th day of October, 1912, the plaintiff, Halawa Plantation, Limited, was in possession of the land upon which the field of cane referred to in the complaint, and wherever referred

to in the complaint, was burned, was in [26\*—1†] under lease to said Halawa Plantation, Limited, and that said Halawa Plantation, Limited, was in actual possession of that land, and owned the cane.

Mr. HEEN.—The defendant will not object to verbal testimony or secondary evidence as to the ownership of the land.

Mr. OLSON.—I will also ask the defendant to admit that at all times mentioned in the Bill of Complaint, the defendant, the County of Hawaii, was a county.

Mr. HEEN.—That is admitted.

Mr. OLSON.—A body corporate and politic, organized and existing by virtue of Act 39 of the Session Laws of 1905, and having all the powers provided in that act, and all acts amendatory thereof.

Mr. HEEN.—That is admitted by the defendant.

Mr. OLSON.—I would like to call Mr. Wight for the time being, subject to his being recalled later on for further testimony. I would like to call him now for one particular point. [27—2]

---

**[Testimony of J. Atkins Wight, for Plaintiff.]**

Direct Examination of J. ATKINS WIGHT.

Q. State your name, please.

A. James Atkins Wight.

Q. Where do you reside?      A. Kohala.

Q. How long have you resided in Kohala?

A. Twenty-three years.

---

\*Page-number appearing at foot of page of original certified Record.

†Original page-number appearing at foot of page of Testimony as same appears in Certified Transcript of Record.

(Testimony of J. Atkins Wight.)

Q. Are you familiar and acquainted with a corporation which is the plaintiff in this suit, known by the name of Halawa Plantation, Limited?

A. Yes.

Q. On the 18th day of October, 1912, did you have any connection with that plantation in any way?

A. Yes.

Q. What was that connection?

A. Manager.

Q. Mr. Wight, on the 18th day of October, 1912, I will ask you if the Halawa Plantation, Limited, the plaintiff in this case, had in its possession, under lease, for a considerable period of time yet to run, a portion of land in the North Kohala District, County of Hawaii, known as Aamakao.

A. Yes.

Q. What was the business of the Halawa Plantation, Limited, at that time?

A. Cane culture and sugar factory.

Q. Carrying on a sugar plantation? A. Yes.

Q. Well, how was the land of Aamakao used at that time? [28—3]

A. Growing crop of planted cane, rather a certain portion of it.

Q. Can you state when that crop, if it had gone to maturity, would have matured, approximately?

A. During the months of April, May and June.

Q. Of 1913? A. Yes.

Q. Did the lease on that land held by the plantation, the plaintiff, at that time, extend beyond those months? A. It did.



(Testimony of J. Atkins Wight.)

Q. When you say it would have matured in those months, do you mean it would have matured then under certain weather conditions, or under all conditions?

A. Under all conditions. That is the proposed time of harvesting, irrespective of weather.

Q. Are you familiar with a fire which occurred there, burning a portion of cane growing on that land, on the 18th day of October, 1912? A. I am.

Q. State whether or not any portion of that cane field was left unburned. A. There was.

Q. A small or large portion?

A. A small portion.

Q. Approximately, what area?

A. Seven and nine-tenths acres.

Q. Seven and nine-tenths acres? A. Yes.

Q. When did the cane on the seven and nine-tenths acres mature, and when was it harvested? [29—4]

A. It was harvested, it was matured and harvested on the 23d and 24th of April, I think.

Q. And if the cane which was growing on the remaining area had not been burned in October, 1912, would it have matured and been harvested about that time? A. Yes.

Q. Where is that land upon which this field of cane was growing with reference to a road or highway known as the main Government Koahala road?

A. On the top of the gulch, on the west side.

Q. What I want to get at more particularly is whether or not it was beyond that road, or some distance from it. A. Short distance from it.

(Testimony of J. Atkins Wight.)

Q. Where did this road run with reference to this land?     A. More or less parallel.

Q. Alongside of this piece of land?     A. Yes.

Q. And that land is located, is it not, in the Aamakao section?     A. Yes.

Q. And the road?     A. Yes.

Mr. OLSON.—I will ask you, Mr. Heen, to admit that the highway or road testified to by the witness was a public highway under the control and jurisdiction of the County of Hawaii at that time.

Mr. HEEN.—That is admitted.

Mr. OLSON.—That, if the Court please, is about as far as I can go at this time. [30—5]

Mr. HEEN.—I would like to understand, I thought I understood you to say that you were calling Mr. Wight at this time for certain informal matters, is that the situation at the present time? If it is, I may utilize further time now on the cross-examination of matters brought out.

Mr. OLSON.—Yes, certainly, I have no objection.

Cross-examination.

Q. Mr. Wight, you are not a surveyor, are you, that is, you don't know anything about surveying?

A. No.

Q. So that you cannot tell of your own knowledge how large a field this was in the Aamakao section?

A. No, not my own surveying.

Q. Whatever you know about it as to acreage would be as to what somebody else told you?

A. From other proof.

Q. From what other people must have shown or told you?     A. Yes.

Q. I presume you have seen the lease of the land in

(Testimony of J. Atkins Wight.)

question or have had it in your possession some time while you were manager :

A. Yes, I think I have.

Q. You say there are yet a number of years to run on this lease? A. Yes.

Q. The plantation still has possession of the land I presume. A. Yes.

Q. And at or about the time the fire occurred, you say the land was planted in cane? [31—6]

A. Plant cane.

Q. Was it first crop or ratoon crop?

A. Plant cane, first crop.

Q. Do you know when it was planted?

A. During the months of May, June and July, or thereabouts.

Q. Of what year? A. 1911.

Q. When you were manager of that plantation, did you keep a record as to the time when you planted this section of the plantation? A. No.

Q. Then you depend solely upon your recollection, Mr. Wight, as to when this section was planted? You are fairly positive it was during those months?

A. Yes.

Q. When you say that the field was planted in May, June or July, do you mean that it consumed those three months to plant the whole field, or it may have been in May, June or July?

A. It was during part of those three months, that that field was planted.

Q. Covering a period of about how long?

A. About two months.

Q. So I take it to be the month of May?

A. The latter part of May we started planting and

(Testimony of J. Atkins Wight.)

we finished it about the latter part of July.

Q. Whereabouts on that field did you start planting?

A. On the west side of the section road.

Q. Will you please explain just what you mean by that west side of the section road.

A. The section road is the road running straight down the middle of the field from what we would say makai to the Government road. [32—7]

Q. That is the road is on the makai side of the section of this land that is planted in cane?

A. Yes.

Q. Then there is a road running through this section from mauka to makai joining the main Government road? A. Yes.

Q. This road divides the land in two?

A. Divides into two, yes.

Q. And you say the cane was first planted on the west side? A. On the west side.

Q. What side would that be as you go from the Government road on to this section road?

A. On the right-hand side.

Q. According to that then, you planted, commenced on the west side of the section road and worked towards the west boundary of the land?

A. No, *we at*, virtually, at the mauka end and worked makai.

Q. Will you make an approximate diagram on the blackboard of that field.

(Witness makes rough diagram.)

Q. This is the west side? A. Yes.

Q. This is the section road you have referred to as running from mauka to makai? A. Yes.



(Testimony of J. Atkins Wight.)

Q. What is that?     A. Section road also.

Q. There is a gate here, isn't there, leading into the Government road?   [33—8]

A. There was at that time.

Q. I will ask you, Mr. Wight, is the portion above the section road running from east to west a larger area than the one below?

A. East to west on the left-hand side, it is smaller.

Q. How about the section on the west side of the section road running from mauka to makai, is that larger or smaller than the section below the section road running east and west?

A. The west side is the larger.

Q. And where did you start planting that cane?

A. At the point here marked X. (The mauka end piece on the west side of the section road running mauka and makai.)

Counsel will agree that the diagram, the various parts on the diagram are marked as follows:

The portion on the west side of the section road running mauka and makai, No. 1.

The portion on the east side and makai of the section road running east and west, No. 2. The remaining portion, No. 3.

Q. Then, Mr. Wight, you say you commenced planting in the latter part of May on the field No. 1, and worked downwards?     A. Yes.

Q. After that what field did you start planting?

A. Section 2.

Q. I presume you followed in this direction?

A. No, from the section road coming down, if I remember rightly.

Q. From the section road running east and west,

(Testimony of J. Atkins Wight.)

then towards the Government road?

A. Yes. [34—9]

Q. After that, you planted No. 3? A. Yes.

Q. From what point? A. Mauka to makai.

Q. Will you please point out what portion of the planted area was not burned by the fire, which you have referred to.

(Witness points out portion.)

Q. That is, it covers a portion of section 1 and 2 of this land adjoining the Government road?

A. Yes.

Q. And covering a greater area in section 2 than in section 1? A. That is correct.

Q. When the fire occurred, did you appear upon scene the immediately afterwards, or was it the next day? A. I appeared on it the same day.

Q. About where did the fire commence?

A. About here. (Point marked X, being on the most easterly point of section 2.)

Q. On the west side of this land, is there a gulch?

A. Yes.

Q. How about the east side?

A. Gulch also.

Q. All along to the mauka boundary?

A. Running right up as far as the mauka boundary.

Q. And on the mauka side of this particular piece of land, was there any gulch there or fallow?

A. There is a fallow.

Q. Immediately adjoining it?

A. Yes. [35—10]

(Testimony of J. Atkins Wight.)

Q. But not separating the lands in the Aamakao section?    A. On the Aamakao lands.

Q. The section beyond that?

A. The section beyond that.

Q. Was there any fence dividing the burned area from the other?

A. No, not on the mauka side.

Q. But at that time there was cane on the mauka side?    A. Yes.

Q. Very young cane?    A. Yes.

Q. About how old?

A. I couldn't exactly say, not more than six months, if that.

Q. You say that the cane planted in this land, in sections 1, 2 and 3 would have matured in about April or May?

A. I mean harvested in April or May of 1913.

Q. When did you figure on it becoming matured?

A. Cane in the Kohala District generally becomes matured in October, November and December, that is when the cane is supposed to come to maturity.

Q. I mean this particular field, when did you expect it to mature?

A. The best time to harvest it is during the months of April, May and June.

Q. When you say that, you mean you get the best results?

A. Yes, cane is at its best then.

Q. Well, cane planted in the Kohala District, takes about two years then, say between 20 and 24 months?    A. Yes, about that time.

(Testimony of J. Atkins Wight.)

Q. That is true of cane planted on lands in the vicinity of this particular piece, does the cane on those lands mature in about 20 to 24 months? [36—11]

A. Yes.

Q. The contour of the land hasn't any influence on the time of maturity, has it?

A. Not particularly.

Q. In what way does it influence it?

A. Of course on lands that are high and exposed, it matures a little quicker.

Q. What sort of land was this, was this exposed land?

A. Some portions were exposed and certain portions were not.

Q. Which part of it were exposed?

A. Portion through here (referring to portion of section 2) certain portion nearby here, and small portion in here.

Q. Referring to that portion which was not burned, a small corner in the mauka east corner of No. 3 and the most westerly portion of section No. 1, is that correct? A. Yes.

Q. When you refer to exposed land, please explain just what you mean by that.

A. Exposed to the wind, and rising a little, coming up here on a hog back and exposed to the wind.

Q. These three places which you have pointed out on the diagram, are they all exposed to the wind coming from the same direction? A. Yes.

Q. And the land lying between these three exposed portions of that particular piece of land, I



(Testimony of J. Atkins Wight.)

would understand then from your testimony, the balance would be somewhat lower than the rest of the land?

A. Not only lower, but flatter. [37—12]

Q. Protected from the wind on account of the other portions being somewhat higher?

A. Not particularly. The protection we have is through trees.

Q. You have trees planted there?

A. On the east boundary.

Q. Kindly point out where?

Witness points from point marked X to mauka end.

Q. At the point marked X, I will ask you whether or not that is somewhat high off the road.

A. What do you mean by high off the road?

Q. Isn't there a steep incline there? A. Yes.

Q. About how far is that cane field from the boundary road, the nearest boundary road?

A. The cane field from the road itself?

Q. Yes. A. Possibly 200 or 250 feet.

Q. Standing on the ground on the road, opposite the point marked X on this diagram, would you be able to see the cane field? A. I doubt it.

Q. Never attempted to see if you could?

A. No.

Q. Now, in harvesting the cane, what was your method of procedure, did you harvest the cane that you planted first, or did you harvest indiscriminately? A. Just depends on the circumstances.

Q. What circumstances?

(Testimony of J. Atkins Wight.)

A. Weather conditions and the best method of getting it to the mill. [38—13]

Q. Would it make very much difference if you first harvested the cane which you last planted in this field?

A. It wouldn't make any difference, just depend on circumstances which was taken off first.

Q. That is, if conditions were favorable for taking out *the from* section 3, you would take that out, even though it had not grown as many months as the cane in field 1? A. Yes.

Q. You don't figure very much difference in the output of two months' growth, do you? A. No.

Q. Do you make any allowance for the cane grown on exposed land, whether you should take that out first before taking cane from the other land?

A. No.

Q. The idea is this,—

A. No difference in the harvesting of it.

Q. Would the output—

A. No, we cannot take that into consideration, cannot go into the middle of a field and take a piece out.

Q. Suppose we take the lower portion, which is not in the middle of a field, the exposed portion, you wouldn't take that out first, would you, if the weather conditions were not favorable?

A. No.

Q. You would take out cane from another portion sooner than you would from the exposed portions

(Testimony of J. Atkins Wight.)

near the road, you say if the conditions were favorable?

A. I don't know what you are driving at. [39—14]

Q. You said a little while ago that cane grown on exposed land matures sooner than cane grown on other lands? A. Yes.

Q. Now, referring to this same field, you would take out cane from the lands which were exposed sooner or later than you would from the other lands?

A. That just depends on the weather conditions, etc., which field we would start on and which field we would finish on. We might start on one field and the conditions change, and we would jump to another portion.

Mr. OLSON.—Possibly Mr. Heen means as to whether or not you would try to give more time for the growth of those parts of the field that were exposed, is that the idea?

Mr. HEEN.—The idea is this. If the cane on the exposed portions of the land matures sooner than on the other portions of the land, whether or not they would take out that cane from the exposed portion of the land sooner than they would from the other portions in order to get better results in the output?

A. Not necessarily.

Q. Supposing the cane in the exposed portions of the land had matured and had arrived at the point best for harvesting, you would not take that out first

(Testimony of J. Atkins Wight.)

if the conditions were not favorable, but would take out cane from the unexposed portions of the field if the conditions were favorable to the unexposed portions?

A. If the conditions were favorable the cane that was matured—was considered most matured would come off first, if the conditions were favorable. [40—15]

Q. Mr. Wight, when you speak about harvesting cane from this particular piece of land, that is to say, as to what point you would commence with the harvesting, being dependent upon circumstances, do you *refer circumstances* or weather conditions surrounding this particular piece, or circumstances and weather conditions throughout the whole plantation, making it favorable to leave one section and go over to another section?

A. Weather conditions at the time of harvesting that field, which would control harvesting of the whole plantation.

Q. Can you explain that a little further in detail?

A. Do you want me to say if the weather conditions were favorable how I would take that field off, or if unfavorable, how I would take that field off?

Q. When you refer to weather conditions, you mean weather conditions throughout the whole plantation and not any particular part?

A. Conditions that would effect the rest of the plantation, and that section particularly. If I were going to harvest—

Q. Supposing it is very rainy in this section?



(Testimony of J. Atkins Wight.)

A. If it is rainy on this section, it is rainy on the whole plantation, as a rule.

Q. Supposing the weather conditions were very rainy throughout the whole plantation, what would that have to do with reference to harvesting any particular field?

A. We would run the plantation by flume then, and would not cut any cane which would be hauled by the wagons.

Q. As to this particular piece, is that cane which can be flumed?

A. All done by wagon. [41—16]

Q. During weather conditions of that kind when you would prefer to harvest fields where you can flume the cane to the mill, would you still maintain that preference even though the cane may not be in as good condition as cane in other parts of the fields?

A. We would try to take that cane off at such a time when we thought the best conditions existed.

Q. During the rainy conditions, you have already stated that you would harvest cane from fields where you can use flumes to your mill, leaving cane on other lands where you cannot use flumes, I presume until some time afterwards; now if the cane during the rainy conditions on the land where you can use flumes is not in as good condition for harvesting as cane on land where you cannot use flumes, you would still give preference to harvesting cane from lands where you can use flumes?

A. I would prefer to take the cane from land where you can use the flumes.

(Testimony of J. Atkins Wight.)

Q. You would still give preference to that?

A. Yes.

Q. When was this seven-odd acres of cane which were burned, harvested?

A. In April, I think the 23d and 24th, I am not exactly familiar with the exact date, but it was the latter part of April.

Q. Was it at its best point of development for harvesting, or had it gone beyond it?

A. It had not gone beyond it.

Q. What state was it in?

A. I considered it just about at its best. [42—17]

Q. What was that acreage, 7.9 acres? A. Yes.

Q. At the time you harvested that 7.9 acres, were the conditions such that you could have harvested the same cane before or after that date?

A. Immaterial; we thought it about the best time to harvest it.

Q. I see, from think it was the best time, you were not forced to cut it by circumstances existing at that time? A. No.

Q. You could have harvested it before or after?

A. Yes.

Q. Say a period of one month or two months before?

A. Certainly not, because the cane was not being matured.

Q. But you could have done it?

A. We could have done it.

Q. You stated during the first part of your cross-

(Testimony of J. Atkins Wight.)

examination that cane in Kohala reaches its highest point of development in about November and December; am I correct?

A. No, at maturity.

Q. It comes to maturity in November and December?

A. About November and December, it is supposed to.

Q. That is provided the cane is planted about twenty months before that?

A. Planted at the right time and weather conditions favorable at the time of planting and right throughout the crop.

Q. Supposing cane was planted say in June, and twenty months after that when it reached maturity, would the cane at that time be as good as cane maturing in the months of November and December?  
[43—18]

A. It is not necessary for cane to run twenty months, cane at twelve months can reach maturity.

Q. What I want to get at is this, suppose you plant cane at some time so as to have it mature in months other than November and December, would such cane be better than cane maturing in those months, or not?

A. We generally call cane matured when the cane has tassels, when it tassels. If it does not tassel it virtually never matures, because it keeps on growing.

Q. Can cane tassel at any time other than November and December?

A. Begins as rule in the latter part of October,

(Testimony of J. Atkins Wight.)

November and December.

Q. Can it tassl at any other time?     A. No.

Q. According to your testimony, then, when cane doesn't tassl, it doesn't reach maturity?

A. No, not exactly that; again it goes on and stops growth, unless weather conditions keep it growing.

Q. When it has stopped growing, stopped at a point before maturity, that is it doesn't tassl—

A. If it doesn't tassl, you can almost virtually say it keeps on growing to a certain extent and weather conditions come along, making it grow considerable.

The COURT.—Does it appear, Mr. Heen, that this is cross-examination; it certainly doesn't appear so?

Mr. OLSON.—I have not made any objection, your Honor, but it certainly is not cross-examination.

Mr. HEEN.—If that is the case, then I have nothing further at this time. [44—19]

Mr. OLSON.—I will ask the defendant to admit that during the times which are involved in this proceeding that one, Naipo, was a regularly employed and authorized road supervisor, having charge of roads and highways, for the County of Hawaii, in the North Kohala District, particularly in the latter part of 1912, including the time the alleged fire took place, and for the several months preceding that time.

Mr. HEEN.—Not road supervisor.

Mr. OLSON.—Road luna, man regularly employed and having charge of the roads.



(Testimony of J. Atkins Wight.)

Mr. HEEN.—I will accept secondary evidence as to that. I thought he was road supervisor, but I see here he signs his name as “Road Luna.” If Mr. Holstein can show me he was the road supervisor—

Mr. HOLSTEIN.—He was the recognized road supervisor.

Mr. HEEN.—I will admit that, and furthermore that he was authorized to employ road laborers in that district. [45—20]

**[Testimony of Koolou, for Plaintiff.]**

Direct Examination of KOOLAU by C. H. OLSON.

Q. State your name. A. Koolau.

Q. Where do you reside? A. Kohala.

Q. How long have you resided in Kohala?

A. Over thirty years.

Q. I will ask you if you resided in the Kohala District during the year 1912? A. Yes.

Q. What was your occupation in the month of October, 1912? A. Road overseer, small overseer.

Q. Luna in other words, is that it?

A. He says small road overseer.

Q. I will ask you if you knew or do know a man whose name is Naipo, Robert K. Naipo.

A. Yes.

Q. The road supervisor of North Kohala District in the year 1912, is that correct? A. Yes.

Q. In the employ of the County of Hawaii at that time? A. Yes.

Q. How were you employed or appointed as small overseer of roads in that district at that time?

A. Thinking that I was capable of holding the po-

(Testimony of Koolau.)

sition as small road overseer, he appointed me.

Q. In other words, I understand you were appointed to that position by Mr. Naipo, road supervisor for that district for the county of Hawaii?

[46—21] A. Yes.

Q. How long had you been such overseer?

A. Four months.

Q. Beginning with what month, do you remember the month?

A. If I am not mistaken, the month of May, perhaps a little before that time.

Q. At any rate for several months prior to and through the month of October, 1912, you were such overseer, were you? A. Yes.

Q. I will ask you if you remember a fire which took place on the Aamakau section of the North Kohala highway or road, in the North Kohala District on the 18th day of October, 1912. A. Yes.

Q. State whether or not you were on that date such overseer as you have explained heretofore.

A. Yes.

Q. How did the fire start?

A. The fire was set there.

Q. Please state while you were such overseer there, did you draw your pay from the County of Hawaii?

A. Yes.

Q. What men were working under you that day?

A. Six men worked under me.

Q. Please give their names.

A. Hanalukala; Kukui; Boniface Poe; Joe Puna; Kahino; Kahoe Kealohoe.

(Testimony of Koolau.)

Q. Were these men regular road laborers of the County of Hawaii under you as overseer at that time?     A. Yes.

Q. I will ask you about what time of day on the 18th day of 'October, 1912, did the fire start?     [47—22]

A. Between seven and eight.

Q. In the morning or in the evening?

A. In the morning.

Q. What was the work which you and these men under you were there to do at that time?

A. Clean rubbish on the side of the road and throw dirt into the road.

Q. And who had directed you to do that work?

A. Naipo.

Q. Where did this fire start?

A. On the side of the road against the bank.

Q. Now, then, will you please explain whether that was on the east side or west side of the road.

A. On the left side of the road.

Q. Was it on—what I want to get at is this. Was there a bridge in that locality?     A. Yes.

Q. And the bridge was mauka or makai of the place where the fire started?     A. On the mauka side.

Q. Now, do I understand you to mean that as you come from the bridge going makai, that the fire was on the left-hand side of the road?

A. Yes.

Q. In other words, that would be the west side of the road, *wout* it not?

A. The gulch runs mauka, the bridge was mauka

(Testimony of Koolau.)

and the fire was on this side.

Q. Who started that fire?      A. I did. [48—23]

Q. What was the fire started in?

A. The fire was started near where we were working.

Q. What was it you were burning?

A. Burning up rubbish.

Q. What was the condition of that rubbish, meaning by that whether it was laying scattered on the ground or if it had been piled together?

A. Yes, it was piled in a long pile.

Q. On the side of the road?      A. Yes.

Q. And next to the pali?      A. Yes.

Q. Who piled that rubbish in that pile?

A. Men that I instructed to do so.

Q. Which one of these men was it?

A. Kahino.

Q. One of the men working under you?

A. Yes.

Q. Who instructed him to pile up that rubbish?

A. I did.

Q. Did you give any instructions as to setting fire to that rubbish to any one?

A. I told him before that.

Q. Told whom before that?      A. Kahino.

Q. Did he set fire to it?      A. No.

Q. What was the condition of the weather at that time when the rubbish pile was set on fire?

[49—24]

A. There was wind blowing that time, fine day and wind blowing.



(Testimony of Koolau.)

Q. Wind blowing from what direction?

A. From Hilo.

Q. Would that be then from the east side?

A. On the east side.

Q. From the east side, is that it?      A. Yes.

Q. State whether or not that is what is ordinarily known as the trade wind?

A. Yes, the wind which always blows in Kohala.

Q. What kind of a wind was that aside from the direction it was blowing and as you have already explained. How was the wind blowing, strong?

A. It was blowing steadily but not strong.

Q. How did it compare with the ordinary Kohala trade winds?

A. My acquaintance with the wind is that when the wind blows like that it is good for the land.

Q. Where was this rubbish collected from?

A. From up on the side of the bank, it was collected and thrown down below.

Q. What did it consist of?

A. Lauhala leaves, dry Hilo grass and other rubbish collected there.

Q. Had it been dry in the Kohala District about this place there for any considerable time before this? In the Kohala District around there, some miles around?      A. Yes.

Q. What had been the weather conditions with reference to being wet or dry up to that date and on that date? [50—25]

A. Dry.

Q. How dry?

(Testimony of Koolau.)

A. No particular rains and dry.

Q. What was the condition of this rubbish, the leaves and the Hilo grass as to being wet or dry?

A. Dry.

Q. Did you notice the condition of the vegetation on the hill side, on the pali side?

A. The rubbish was dry, but other things growing were green.

Q. What was there on the side of the pali there by the side of the rubbish pile?      A. Guava.

Q. Was there any dry grass?      A. Dry grass.

Q. State whether there was any such at the time the fire was lighted to the rubbish pile?      A. Yes.

Q. What happened as to that fire after you lighted it?

A. After the fire was started, I told this man Kahino to put some green leaves over it and the men above and farther along to clean away the rubbish.

Q. What was growing up above the pali, or what was the condition there as to vegetation up above the pali and beyond?

A. Some dry grass, some green grass growing there.

Q. What was there beyond the trees and vegetation growing at the top of the pali?

A. Hau, guava and grass.

Q. And beyond the trees?

A. Hala trees some places. [51—26]

Q. I mean beyond the trees, over in the field. Was there cane growing over there beyond?

A. Yes. Some distance away.

(Testimony of Koolau.)

Q. State whether or not you knew there was such a cane field there that morning.     A. Yes.

Q. And what is there between the edge of the pali and that cane field, or what was there?

A. Puahala.

Q. Trees?     A. Yes.

Q. Grass and vegetation?     A. Yes.

Q. How large was that cane, was it large or small at that time?

A. Yes, it was large, but not probably fit to harvest.

Q. But it was large?     A. Yes.

Q. Now then, I want you to explain just how that caught, or did that fire get into the cane fields?

A. Yes.

Q. Now, explain just how the fire proceeded from the rubbish pile that you set it to through the intermediate territory to the cane field.

A. The reason is because after the fire was started, the wind began to blow.

Q. The wind was blowing when you set fire to the rubbish pile, was it not?

A. The fire was lit before that.

Q. How large was this rubbish pile?

A. About twelve feet long. [52—27]

Q. Well, about how wide?

A. Between two and three feet.

Q. Now, I want to get at the condition of the wind. Wasn't there some wind blowing, a trade wind blowing that morning before the fire was set, a fair steady wind? Now, state what the condition of the wind was when the rubbish was being piled together and

(Testimony of Koolau.)

at the time you lighted it.

A. When the rubbish was being piled together the wind was blowing, wind, the general wind of Kohala, but I didn't think it was blowing strong enough to make any trouble, and the fire was lit.

Q. Could you have disposed of that rubbish in any other way than you did?

A. Yes, I could, but it was a long distance away, and I thought it would make no trouble burning it.

Q. How far away?

A. If I am not mistaken, I think about four chains.

Q. In what direction?      A. Mauka side.

Q. Toward the bridge?      A. Yes.

Q. Now then, referring to the street out here in front of the courthouse, would that bridge be about as far away as that road?

A. I think so, about that.

Q. You could have taken that rubbish over there and disposed of it, could you?

A. Yes, I could, but I thought it would facilitate matters by burning it there. [53—28]

Q. I will ask you this, if you had thought of the possibility of the grass on the side of the pali catching on fire from the rubbish pile, what would you have done?

A. What I did was that when this fire got started, I called the men to put it out.

Q. But before you started the fire, if you had thought that the grass on the side of the pali might catch on fire from the rubbish pile, what would you



(Testimony of Koolau.)

have done in that case, would you have taken it off some place else?

A. Yes, that was the reason why I told the men to go up on the top of the pali and cut down the dry stuff and throw it down below.

Q. Do I understand that they didn't do that?

A. They did.

Q. Which men were those that did that?

A. Joe Puna.

Q. Any others?

A. Joe Puna was cleaning the rubbish, there were other men up there throwing down dirt.

Q. What other men, I want to get the names of the other men?

A. Those who were shoveling dirt was Hanalukala, Boniface and Kukui.

Q. Those three?

A. Those three were shoveling dirt.

Q. At the top of the pali?      A. Yes.

Q. That is after you had started burning the rubbish pile? At what time was it with reference to the time you had started the fire to the rubbish pile?

A. Before the fire was set these men were working there. [54—29]

Q. Now explain just where they were working in that way.

A. On the top of the pali.

Q. At the side, or immediately above the rubbish pile?

A. The men were shoveling dirt in one place, the

(Testimony of Koolau.)

other men were cleaning out this rubbish in another place.

Mr. OLSON.—I would like to withdraw the witness from the stand for a few moments in order to put Mr. Southworth on the stand.

No objection.

Mr. Southworth's testimony follows that of—

KOOLAU recalled.

Q. Mr. Koolau, I want to show you a picture, a photograph, which has been admitted in evidence as Plaintiff's Exhibit 1, representing the place where the fire began and went up the side of the pali, and ask you if you recognize that as the location.

A. I think it was there. (Witness pointing approximately to a point on the picture representing a figure of a man.)

Q. Then you do recognize this exhibit, this picture of the general location where the fire started and around that? A. Yes.

Q. Now you have identified the place, or pointed out the place where the fire started as being approximately where the white spot is on the picture below the letter "X," have you not?

A. At that point the fire was started. Some men were working over here on this side. [55—30]

Q. You mean the right side, do you not?

A. Yes, right side.

Q. Where were the other men working?

A. The other men were right above here, where the fire was started. One man above, one man below.

(Testimony of Koolau.)

Q. One man above where the fire was started?

A. Yes.

Q. Was that man Poe?      A. Kahino.

Q. He was above?

A. He was below. Joe Puna was above.

Q. Where does the pali end and the incline begin on that picture, did you say?

A. I think about there.

Q. Do you mean, pointing as you are at the present time to the place where the letter "X" is marked, just above there?      A. Yes.

Q. Was it up above that point at the top of the pali, where Joe Puna was working?

A. Joe Puna was just a little below the upper edge cleaning up rubbish.

Q. When did you send him there, with reference to the time you set fire to the rubbish?

A. Little before seven I sent him up there.

Q. Where was he working at the time you set fire to the rubbish pile?      A. He was above.

Q. Still there, was he?      A. Yes. [56—31]

Q. What did he do when the fire was started?

A. He was cutting grass above and throwing it below while the men below was piling up the rubbish.

Q. You saw all that, did you?      A. Yes.

Q. When did you first see the fire start going up the pali side?

A. Between seven and eight.

Q. But did you stay right there looking on and see what was happening after you set fire to the rubbish pile, or did you go away?      A. Yes.

(Testimony of Koolau.)

Q. You stayed there, or went away?

A. I stayed there.

Q. Now, did you see the fire when it first started going up the pali side, or only after it got over the pali?

A. One of the men working below told me the fire had got started up above, perhaps the fire had jumped and caught on something above there.

Q. You don't know just how it got started up the pali, yourself, is that it?

A. I don't know when it caught on fire, but I was told it had caught on fire, and I looked above and saw it burning.

Q. What were you doing since you didn't see it start up the side of the pali?

A. I was directing the men above about cutting off the grass at other places.

Q. Directing the men above, what men do you mean?

A. Those men working with me, Joe Puna and Kahino. [57—32]

Q. You told us where Joe Puna was working, now where was Kahino?

A. He was down where the fire was.

Q. Down on the road, was he? A. Yes.

Q. When you saw that the fire had got started like that, what did you do?

A. When I saw that the fire had started, I told Joe Puna to go over there and strike it with the shovel. When the fire started on the pali, I told Joe Puna to go over there and put it out with the shovel.



(Testimony of Koolau.)

Q. Did he go?     A. Yes.

Q. What did he do?

A. When he got directly over where the fire was, he was afraid and stepped back.

Q. Was there anybody else trying to do anything at that time?

A. There was some more people there, but they were some distance away.

Q. What did Kahino do?

A. He was down where the fire was, and was putting green rubbish on the fire.

Q. Did he do anything about the fire, or in regard to the fire which was going—had started up the pali?

A. He didn't go up to where the fire was on the pali.

Q. Did anybody else?

A. With regard to the fire, a number of people came to help.

Q. You mean people working for you?

[58—33]

A. Men working with me.

Q. Were they able to do anything to stop the fire?

A. Yes, some of them go above there and got the rubbish out of the way and tried to put out the fire, but they couldn't do it.

Q. Why not?

A. The fire got too much headway.

Q. How far did that fire go?

A. The fire had gone about six feet when they were up there trying to put it out.

(Testimony of Koolau.)

Q. Then what?

A. I found they couldn't do that and I told them to go further up and get the rubbish out of the way, perhaps we could stop it that way.

Q. Did they do that?

A. They went up there, then I called other people to come and help us.

Q. Who were these other people?

A. People working with John Sniffen.

Court takes recess at 12:00 M. to 1:30.

Q. Let me see if I understand you correctly, at the time you first saw—at the time when the fire had got started on the pali, Joe Puna was working above and Kahino was below? A. Yes.

Q. Will you tell us just where Hanalukala was at that time.

A. He was in another place working.

Q. About how far away?

A. Between three and four furlongs. [59—34]

Q. Now take the courtroom here, was he as far away from the fire as the width of this court room?

A. About from here to the attorney.

Q. About twenty feet would that be about right?

A. Yes.

Q. Where he was working, what was he doing, what was his work at that time?

A. Throwing down dirt.

Q. Where was he himself, Hanalukala?

A. He was there working.

Q. On the road or up on the pali?

A. On the pali.

(Testimony of Koolau.)

Q. Up on the pali? A. Yes.

Q. On which side was he, the side toward the bridge, or the side away from the bridge?

A. Not on the side nearest the bridge, on the other side.

Q. On the side away from the bridge is that right? A. Yes.

Q. Where was Boniface Poe?

A. They were together.

Q. Together with Hanalukala?

A. They were working together.

Q. In the same place? A. Yes.

Q. Was he on the road or on the pali?

A. He was up above with Hanalukala.

Q. Where was Kukui? A. They were there.

[60—35]

Q. Was he at the same place as Hanalukala and Boniface Poe? A. Yes.

Q. Same place? A. Yes.

Q. On the pali or on the road?

A. Above, on the pali.

Q. Where was Kahoe Kealoha?

A. He was down at the warehouse.

Q. You mean near the bridge, do you? A. Yes.

Q. About how long did it take for this fire to go through that part of the land where the trees were, the lauhala trees and the brush was, until it came to the cane field?

A. Half an hour perhaps, perhaps not.

Q. Might be less than that?

(Testimony of Koolau.)

A. I don't think it struck eight when it caught into the cane.

Q. You said it was between seven and eight that the fire started?     A. Yes.

Q. What were your men doing and the men from Sniffen's gang, during this time before the fire came to the cane field?

A. Sniffen's men were working on that side, throwing dirt, and my men were trying to put out the fire.

Q. Did Sniffen's men come and help with the fire at all?

A. After that time they came and helped put out the fire in the cane.

Q. But not before it came to the cane, is that right?     A. No.

Q. When did you first see Sniffen's men that morning? [61—36]

A. Before seven the men got there to work I seen them.

Q. How far were they, where they were working, from where your gang was working?

A. I think it was over eight chains, there was a building there.

Q. On the other side of the bridge, was it?

A. Yes.

Q. Could you have called them, could they have heard you if you had called out to them?

A. I called them.

Q. But I ask you could they have heard them if you had called out to them?



(Testimony of Koolau.)

A. I don't know. I called them, but I don't know whether they heard me or not.

Q. What did you do yourself, after the fire started?

A. When I saw the fire got started, I tried to best of my ability to put it out.

Q. What did you do yourself?

A. I went up the pali and tried with my men to get the rubbish out of the way so that the fire wouldn't spread, but we couldn't do it.

Q. I will ask you whether or not you and your men working under you tried to help in stopping the fire after it got into the cane field?      A. Yes.

Q. How long did you stay, you and your men, after the fire started?

A. I went up there where the fire got into the cane and tried to break down the edge of the cane to stop the fire, but as we couldn't do it, I sent man around the other side to call some plantation laborers to help put out the fire. [62—37]

Q. How long was it before they arived, if they came at all?

A. When the fire went into the cane, we tried to put it out, and then I sent for those men to come and help and see if they couldn't help put it out.

Q. How soon did they come?

A. I don't know the time. After he had gone, I sent some men in on the other side to fight back the fire so it wouldn't get on another section of cane.

Q. Who were those men that you sent in?

A. Hoe, Kahino.

(Testimony of Koolau.)

Q. Anybody else?

A. Some other people helped.

Q. Were there any of your gang?      A. Yes.

Q. Who?

A. Hanalukala, Hoe, Kukui and Joe Puna.

Q. You sent all of your men in there did you?

A. No. Four of my men went in, and two stayed out with me, trying to put out the fire on the pali.

Q. Did you see the whole cane field burn?

A. I didn't see all of it.

Q. How long did you stay there that day?

A. I stayed there and went and tried to put out the fire. When the fire was extinguished I came back. The men stayed there working.

Q. What time of day was it when the fire was finally put out?

A. Between eight and nine my men came back and said the fire was almost extinguished, I then ordered them to go to work.

Q. And you worked there the rest of the day, did you?      A. Yes. [63—38]

Q. Now you live—do you live anywhere in the neighborhood of this field?      A. No.

Q. Where do you live?

A. In the middle of Halawa.

Q. How far away from this place where you were working on that day?      A. About half a mile.

Q. How long had you lived there?

A. Over ten years.

Q. Do you know the country in that vicinity

(Testimony of Koolau.)

there, including the place where this fire took place, or not?     A. Yes.

Q. Did you know prior to that time whether or not there was a field of cane growing up there in that section where the fire swept over?     A. Yes.

Q. Had you seen it before that day?     A. Yes.

Q. Once or twice or many times?     A. Yes.

Q. Many times?     A. Yes.

That is all. [64—39]

Cross-examination of KOOLAU by W. H. HEEN.

Q. About how wide is that road at the place where you started the fire?

A. I think perhaps twenty feet, perhaps a little more, perhaps a little less.

Q. On the lower side there is a decline isn't there, on the lower side of the road?

A. Yes, on this side a decline which goes into the cane.

Q. When you started to go to work that morning with these men you have named, had you received orders to go to this particular place?     A. Yes.

Q. What did you intend to do when you went there?

A. The overseer told me to go there with my men and Sniffen would tell me what to do.

Q. What did Sniffen tell you to do there?

A. Sniffen came there and pointed out to me what to do, and to put, to throw dirt on the road. Sniffen told me here is where you are to work, remove the grass, guavas and other underbrush and get out the dirt.

(Testimony of Koolau.)

Q. That is, you were told to remove the underbrush and guavas from the pali? A. Yes.

Q. So you did that—you had your men do that? A. Yes.

Q. Then you had on the hill removing the underbrush, Joe Puna, Kukui and Boniface Poe?

A. Joe Puna was removing the underbrush, the others were shoveling dirt. [65—40]

Q. Were the others shoveling the dirt from the place where Joe Puna had removed the underbrush?

A. Yes. Not where the underbrush was falling down, but to one side. The underbrush was removed, then they threw the dirt down.

Q. When the dirt was thrown down what was done with it?

A. This dirt was taken over near the bridge where they were working.

Q. Was it used on the road at the bridge or near the bridge?

A. Raising the elevation of the road near the bridge.

Q. Who was working there?

A. Nobody working at that time. The dirt was taken there and perhaps my men or Sniffen's men would work there afterwards.

Q. Was this a concrete bridge already built, or was it in the course of building at that time?

A. They were working at it then, under construction.

Q. And the dirt was used in connection with the building of the bridge? A. Yes.



(Testimony of Koolau.)

Q. You say the bridge was in the course of construction, were there any men around there?

A. Yes. Some men were working at the bridge at that time.

Q. The dirt was used on the bridge or on the approaches to the bridge, when you were removing the dirt to this place?

A. The dirt was just thrown down in piles there at that time, to be taken later to the bridge.

Q. No dirt then was taken from this place where you were working to the bridge on that day?

A. No, not taken.

Q. Who was building that bridge? [66—41]

A. A white man and his helpers.

Q. Wilson, wasn't it?

A. He was the contractor, but I don't know the name of the man who was building the bridge.

Q. He was building this bridge under a contract?

A. Yes.

Q. How long after the men had started working was it when you lit the fire?

A. We all started in work the same time, seven o'clock. When the fire got started, I called them, but I don't know whether they heard me or not.

Q. How long after you had commenced working with these men at this particular place, how long after that was it when you lit the fire?

A. I said before somewhere between seven and eight o'clock.

Q. Was it ten minutes after you commenced work or twenty minutes after? Give us your best judg-

(Testimony of Koolau.)

ment on that. A. Somewhere about that time.

Q. That is between ten and twenty minutes after you commenced work? A. Yes.

Q. The rubbish that you got together, was that the rubbish that Joe Puna had cut on the pali and thrown down to the road? A. Yes.

Q. And how big a pile was this rubbish when you started to burn it?

A. In height about a foot. About two fathoms long.

Q. That is, about twelve feet? What did it consist of?

A. Dry Hilo grass and other debris which had collected there.

Q. Sticks? [67—42]

A. Yes, sticks and other things what I thought might make trouble.

Q. What do you mean when you say other things which might make trouble? Do you mean by that that you wanted these things removed so as not to catch on fire from the fire which you intended to start? A. Yes.

Q. That is, you removed or had the rubbish removed in order that that rubbish might not be burned from the fire which you intended to start below?

A. No. I removed all this rubbish with the object of burning it at the bottom and it would not catch on fire up above.

Q. You intended to start a fire below of some rubbish? A. Yes.

(Testimony of Koolau.)

Q. And you knew that there was considerable rubbish, dry material on the pali near the place where you intended to start the fire?

A. I cleaned that rubbish up above where I was to start the fire and then had my men go further along cleaning off other places.

Q. That is, you had your men go further along cleaning up the dry rubbish. Do you mean you sent your men further along inside towards the cane field? A. On the side of the road.

Q. You had the men remove additional rubbish near the place where you intended to start the fire in order that the rubbish might not be there to catch any sparks from the fire you were to start?

A. Yes. [68—43]

Q. How far back did the men go in clearing the rubbish from this place where you intended to start the fire?

A. From down below where this fire was to be lit, up to where they cleared off, was over nine feet, perhaps ten feet straight up and down.

Q. From the top edge of this place towards the cane field how far did they go from the edge in cleaning up the rubbish? A. About one hundred feet.

Q. Point out the distance from where you are sitting?

A. About from here to the jailor's house, perhaps a little bit this side.

Q. About how wide a space did they clean up?

A. About twelve feet up above they had cleaned off, and that was the length of this rubbish pile.

(Testimony of Koolau.)

Q. And you made sure then, did you not, that sufficient space had been cleared off so as to prevent danger of the fire catching on the pali from the fire below?

Question withdrawn.

Q. Who was below at the time you started the fire?     A. I and Kahino.

Q. Did you tell Kahino to start the fire before you did, did you tell Kahino about starting the fire?

A. Yes, I told Kahino to get this rubbish together and if he saw that the wind was light to burn it up, and I went down to the warehouse to get some tools.

Q. When you came up did you take notice of the wind?     A. I knew the condition of the wind.

Q. I mean did you take particular notice of the wind at that time? [69—44]

A. I knew the condition of the wind at that time.

Q. Describe to the jury just how strong that wind was, if there was any wind?

A. Prevailing wind of that land that morning.

Q. Was it just simply a light breeze?

A. Light breeze.

Q. When you started the fire, did it make the fire strong?

A. When the fire was started, it burned all right, but not strong.

Q. Did the wind turn the blaze in the direction it was blowing, at the time you started the fire? Did it turn the flames from this side in the direction it was going at that time?

A. When the fire was started, nothing but a light



(Testimony of Koolau.)

breeze was blowing, afterwards a strong wind came up.

Q. This light breeze was it affecting the fire at the time you started it, before the big wind came along?     A. No.

Q. How far to the side of the road, that is, to the side that rose up about nine or ten feet, how near to this bluff was the pile of brush at the time you started to light it?     A. Close to the bluff.

Q. Right next to it?

A. About a foot away, about a foot away from the edge of this bluff.

Q. Was it upon the road or off the road?

A. On the road, on the side.

Q. Is there any ditch there?     A. Yes. [70—45]

Q. At this place where you had this pile of rubbish about twelve feet long, on the side of the bluff next to the rubbish, was there anything growing there?

A. All of it had been thrown down.

Q. Left bare rocks around there, is that it?

A. Yes.

Q. Before you started the fire, did you have the sides clear? You stated you cleared a space of twelve feet on the pali, did you have it all cleaned of rubbish?

A. It was not cleaned twelve feet wide, one hundred feet long going towards the cane, but on the edge of the pali.

Q. That is, from the edge of the pali you had a space of about twelve feet wide cleaned, the growth

(Testimony of Koolau.)

removed from the space?

A. Just as the pali was lying, just so did we clean the rubbish.

Q. At the time you started the fire, and at the place where the rubbish stood, how far back had the men cleaned?

A. This pali was about nine feet high. We cleaned here and then went along further to clean, so that in lighting this fire, nothing would catch on fire further along.

Q. On the steep side?      A. Yes.

Q. Now supposing this is the road (space of lower book along upper book) and supposing the edge of the upper book (the edge which appears over and on the lower book) is the pali, and supposing the middle of the lower book, near to the pali, is that the spot where the rubbish was?      A. Yes. [71—46]

Q. Now you say about the place where the rubbish was, that was all cleaned?      A. Yes.

Q. Was there any rubbish along the side of the bluff?

A. Yes, rubbish was there on the side of the bluff.

Q. What kind?

A. Same as the kind of rubbish thrown down.

Q. Isn't this bluff somewhat rocky, isn't the bluff cut into the rock?

A. Yes, it is a bluff cut into the side of the hill, and some of the dirt and stone removed and some left there.

Q. Not very much dirt is there on the bluff?

A. Plenty.

(Testimony of Koolau.)

Q. Now, how much of this bluff was cleaned, or how much was cleaned before you lit the fire?

A. The same as this pile of rubbish lying down below, that was the amount of the bluff cleaned.

Q. You didn't clean that bluff did you for the purpose of getting dirt from it?     A. Yes.

Q. I mean this edge of the bluff, you didn't intend to get your dirt above the bluff?

A. No. Just digging on the sides and taking a long distance.

Q. When you started to burn this rubbish on the road, was this part of the bluff cleared of rubbish on the side?     A. No.

Q. You didn't want to see the cane fields burned when you started the fire, did you?

A. Yes. [72—47]

Q. When you said yes, you meant yes, you didn't want to see the cane catch on fire?     A. Yes.

Q. You had in mind at that time that there was a possibly of the cane catching on fire from the fire you were starting?     A. Yes.

Q. And, therefore, you had some part of this pali about the place where you were starting the fire, cleared as you stated before, so that the sparks would not land on that portion of the pali?     A. Yes.

Q. As you testified before, the rubbish was about here on the road, that is on the middle of the lower book, towards the edge; now did you clear this part of the pali, and over the point where the rubbish was?

A. I didn't clear it on top of the pali which went off into the cane, only on the edge here, so I could throw

(Testimony of Koolau.)

the dirt down below.

Q. Were the men able to stand on this bluff?

A. Yes, places on here that they could put their feet in and stand up, there were little ridges.

Q. Where was Joe Puna standing when you lit the fire?

A. About half way up on the side of the pali.

Q. About how high was that from the ground where he was standing, how high was that?

A. I think about five feet where Joe's feet were.

Q. At any time, did the men get over the bluff on to the portion that leads up to the cane field? [73—48]

A. After the fire got started up here, then some of the men got on top of the bluff trying to get the rubbish out from there to stop the fire, but they couldn't do it.

The COURT.—Do you mean, that to get the dirt, the men were making a straight cut on the bank, and were not scraping from above?

A. Yes, straight cut of perhaps one or two feet wide on this bank.

Q. They were cutting straight down? A. Yes.

Mr. HEEN.—That part of the pali, which commenced from the abrupt part as to the road, slanted upwards in about that manner (indicating about 45 degrees)? A. Yes.

Q. When you started to work on the road at this place, you noticed the rubbish on the incline, didn't you? A. Yes.

Q. Didn't you think at that time that the sparks



(Testimony of Koolau.)

might fly from this fire to the rubbish on the bluff?

A. No.

Q. About how large an area did you have cleared before you started that fire?

A. Just the size I testified to before, about twelve feet cleared from the edge down to the road.

Q. You say twelve feet from the top down to the bottom?

A. About nine feet or perhaps over, from the top to the bottom, and about twelve feet long on the side of the pali. [74—49]

Q. On either side of this portion of twelve feet in width, was the growth thick or very light?

A. Yes, thick growth.

Q. What kind of growth was on either side of this portion of twelve feet of cleared space?

A. Hilo grass, ferns and other stuff.

Q. Dry?      A. Dry.

Q. Were you not afraid the fire might catch on that?

A. I didn't think it would jump on this side, I thought only go up this edge and stop.

Q. At which end did you start this fire, or whereabouts did you start this fire, on this rubbish pile about twelve feet long and a foot high? Did you start it at one end, or in the middle, or where?

A. Right here, near this end.

Q. That is, you lit the fire on the end towards the bridge?      A. Yes.

Q. At that time, did you notice in which direction the breeze was blowing?      A. From the Hilo side.

(Testimony of Koolau.)

Q. Indicate here in which direction the wind was blowing, this way, that way, or which way, or towards the bluff?

A. This way the road runs leading to the bridge, the wind was from this direction (indicating a direction towards the pali).

Q. Whereabouts did you see the fire on the pali, when your attention was first called to it? [75—50]

A. On the edge from where the rubbish had been removed.

Q. You say there was no rubbish in that place?

A. The fire was started down below here, and the wind was blowing. I didn't think there would be any trouble, but later, the fire was turned back as it were, by the wind.

Q. Now supposing this is the cleared space, the space to which you have referred, about where was the fire when you first saw it on the pali?

A. Right on the edge where my men had been clearing. The wind blew the flames that way and this way, and then caught up here on the edge.

Q. This fire, which you saw on the pali, was it on the bridge side of the cleared space?

A. On the bridge side.

Q. Was it already on the edge of the pali when you saw it, or further up? A. Right on the edge.

Q. What was there at that time?

A. A little rubbish, not very much.

Q. What kind? A. Hilo grass.

Q. Were you able to see that Hilo grass from below? A. No.

(Testimony of Koolau.)

Q. Why not?

A. This place had been cleared, and the grass cut, but some leaves had been left standing, and that was what caught on fire.

Q. Some leaves, what kind of leaves?

A. Grass blades. [76—51]

Q. Was it grass blades that caught on fire?

A. After the grass had been cut, that what still remained.

Q. I asked you a little while ago, why you didn't see that grass, was it because it was beyond the edge?

A. I didn't think that the grass would catch on fire.

Q. Did the grass or the growth on the bridge side of this cleared space, to which you have already referred, did that growth catch on fire?

A. Not there, but up above it did.

Q. How about the growth on the other side of this cleared space, did that catch on fire?

A. It first caught on fire over here, afterwards up here, and then the fire run down on the side of the pali over here.

Q. You said before, that the first time you saw the fire, it was above the cleared space towards the bridge, now you say this caught on fire first. That is, on the side away from the bridge, that is of the cleared space?

A. The fire jumped up here. Some of the men tried to put the fire out up here, then it went around just where it pleased.

Q. When you first saw the fire on the pali, was it a

(Testimony of Koolau.)

big blaze at that time, or just a small blaze?

A. Small.

Q. Was Joe Puna right there?

A. He was about half way down on the side.

Q. Did he call your attention to that blaze?

A. When I saw the blaze there, I ordered Joe to go himself.

Q. Did he go?

A. He got to where the fire was burning here, and got afraid and went back. [77—52]

Q. What did you do?

A. I started to send the fellows—

Q. What did you do?

A. I got up there, I called the men to come around on the other side and turn the fire back.

Q. Where were the other men, on the bridge side of the cleared space, or on the opposite side?

A. On the upper side.

Q. Whereabouts would that be according to this illustration? A. This side.

Q. Were they on the ground?

A. They were about five feet up, the same as Joe Puna over here.

Q. And how near to the cleared space were they?

A. About three fathoms, or about twenty feet away.

Q. And on the side about half way up, that is, on the side of the bluff? A. Yes.

Q. This wind that came along, was it a very violent wind? After you had started the fire?

A. Not strong.



(Testimony of Koolau.)

Q. Referring to the wind that arose after you started the fire, was that a very violent wind?

A. The first wind I referred to was light, afterwards strong, coming from the direction of the bridge, and from the opposite direction.

Q. Was the wind one of extraordinary character, that is, the strong wind that came after you started the fire?

A. Not very strong. It was strong coming from above and below. [78—53]

Q. Was it a wind that was of the usual nature around there? A. No.

Q. This wind then, was unusual, you had never seen a wind like that in that place?

A. Yes, peculiar wind.

Q. After you saw the fire on the pali, you then tried to put the fire out in this rubbish?

A. Yes, I tried to put it out, and ordered my men to try and put it out.

Q. Threw dirt on it? A. Yes.

Q. And the men, you sent some men above to clear away the rubbish? A. Yes.

Q. Did you succeed in putting out the fire below in this rubbish pile?

A. We didn't care for the fire below, we were looking out for the fire above.

Q. As you threw dirt on this rubbish pile below, did it go out? A. Yes.

Q. How much of it had burned before you saw the fire on the pali? A. Very near half.

(Testimony of Koolau.)

Q. Your main work that day was getting dirt, was it not?

A. The idea was to get quite a lot of dirt from the side of this pali.

Q. Incidental to the work of cutting dirt from the steep bank, you had to cut the brush off that was growing on that bank, didn't you? A. Yes.

Q. That is the reason you cut the brush, you set fire to it to [79—54] get it out of the way?

A. Yes.

Q. You said that no dirt had been pulled down from the pali, the cleared space directly in front of the rubbish pile, but that some of the men had pulled down some dirt on the side of the space? A. Yes.

Q. About how far from this space immediately in front of the rubbish pile?

A. As I testified to before, they were about three fathoms away from this place where they were working, where this place was cleared.

Q. On the side towards the bridge? A. No.

Q. On the opposite side? A. Yes.

The COURT.—You and your men weren't making any effort that day to clean up the road, scrape up the rubbish, or anything of that sort, were you?

A. No.

That is all. [80—55]

Redirect Examination.

Q. This dirt you were preparing to get here, you intended to use that for the purpose of filling up the road approaching the bridge? A. Yes.

Q. In connection with your road work then, was it?

(Testimony of Koolau.)

A. Yes.

Q. Was there any of this rubbish which you had piled together in this pile, which you afterwards set fire to, which was gathered up from the ditch along the road there?

A. From the ditch and the side of the pali.

Q. Both, is that right?      A. Yes.

Q. This man Sniffen, whom you have spoken about, was he also a road luna there under Naipo?

A. Yes.

Q. Had your men begun digging away any dirt yet before setting fire to that rubbish pile, or had they simply pulled down some of the rubbish?

A. Yes. The men were throwing down dirt where the place had been cleared off of rubbish, Joe Puna was in advance pulling off the rubbish.

Q. Who was the man pulling down the dirt?

A. Hanalukala and they.

Q. Whom do you mean by they?

A. Hanalukala, Boniface Poe and Kukui.

Q. I thought you said on your direct examination that Hanalukala, Poe and Kukui were working off to the side from this brush pile, or rubbish pile, at the time you set fire to it? [81—56]

A. Yes, I said that.

Q. Do I understand you to say it wasn't this particular place in front of the rubbish pile where this dirt was being pulled down?      A. No.

Q. It wasn't there, is that it?

A. Not there.

Q. At this place, in front of this rubbish pile, I

(Testimony of Koolau.)

will ask you if any dirt had yet been pulled down?

A. After the fire had been lit and the wind came in, I instructed Joe Puna to go up there and throw some dirt down on it.

Q. Up to the time you set fire to the rubbish pile, had any dirt been taken down from that place in front of the rubbish pile, for the purpose of putting dirt on the road? A. Yes.

Q. When you set fire to the rubbish pile, I will ask you if at that time, or before that time, any dirt had been taken down from the pali directly in front of that rubbish pile?

A. Not immediately in front of that place, but off to one side.

Q. Now is that right? A. Yes.

Q. Do I understand that you mean to say that none of the rubbish and vegetation, trees, grass, etc., which was growing on top of the pali about nine or ten feet high there, had been cleared away?

A. It had been cleared some on top of the pali and thrown down below.

Q. Do I understand by that you had cleared the side of the pali, and not on top? [82—57]

A. Not on top, on the side.

Q. And, therefore, when you were testifying before, on your cross-examination, to have had cleared about twelve feet, you meant, did you not, that you had cleared a space about twelve feet on the side of the pali, where it was steep, almost straight up and down?

A. Yes, on the side of the pali, just like on the side



(Testimony of Koolau.)

of the house here, until it reached the bottom.

Q. Now, I understand you to tell, you told Kahino to burn the rubbish, did he set fire to the rubbish?

A. Yes, I instructed him to burn the rubbish that morning, to make a long pile and set fire to it, but he didn't do it when I returned.

Q. When you were illustrating this place that had been cleared on the side of the pali, where it stands straight up and down nine or ten feet high, I understood you to testify that after the men got through working there, clearing off the rubbish, there were still some grass, weeds, something of that sort left on that space, am I right in that understanding?

A. Yes, there was some small rubbish there, dry leaves and grass, which I told them to take out, throw down below and throw into the pile.

Q. But after they got through doing that, wasn't there some grass remaining on the side of the pali?

A. From what I could see, there was nothing there, but there was up on top.

Q. Just where was it that the fire caught on the land adjoining the rubbish pile, as far as you remember? [83—58]

A. Here is the pile of rubbish lying down here.

Q. Indicating the road?

A. Yes. About a foot from this end of the rubbish pile, the end nearest the bridge, I set fire to this rubbish pile. I set fire to it, and it had been burning perhaps five or ten minutes, when this wind came in from below and from above and threw the flames up on top here and caught fire.

(Testimony of Koolau.)

Q. Did it catch fire on the side of the pali which is toward the bridge, the side on which the dry grass and rubbish still remained?

A. It caught on fire up on top where this place had been cleaned under orders from the luna, and caught on fire up on top here.

That is all.

Mr. OLSON.—Just one more question, if your Honor please, you were subpoenaed by the county to appear here as a witness, were you not?

A. Yes.

The COURT.—You said a few moments ago, that the brush and stuff was cleared from the steep part of the bank in order that you might slice down the dirt, is that correct? A. Yes.

Q. And at the time that the clearing of the brush was done, it was without regard to any fire, was it?

A. Without regard to setting the fire. [84—59]

Q. But afterwards, when that brush had been lighted, there was nothing done, was there, to clear up other loose stuff until the fire had gone over the bank?

A. When this fire started there was no more rubbish on the side of the pali, the fire caught on top.

Q. The fact is, that, until the fire spread or jumped, caught up above, there was no gathering up of brush except what you had originally done in order to get the dirt? Anyway, there was no further gathering of brush until you had discovered that the fire had gotten up above? A. Yes.

(Testimony of Koolau.)

Mr. HEEN.—How high did the flames rise from this fire in the rubbish pile before the unusual wind came?     A. About three feet.

That is all.     [85—60]

**[Testimony of E. A. Southworth, for Plaintiff.]**

Direct Examination of E. A. SOUTHWORTH.

Q. What is your name?

A. Edward Augustus Southworth.

Q. Where do you reside?

A. Hilo, at the present time.

Q. Where were you residing in the month of October, 1912?     A. Hilo.

Q. What is your profession or occupation?

A. Civil engineer.

Q. How long have you been a civil engineer?

A. About 14 years.

Q. What was your occupation in the month of October, 1912?

A. County engineer, for the county of Hawaii.

Q. I will ask you if you learned, in that month, of a fire which had taken place on land at Halawa, adjoining the Aamakao section of the North Kohala highway or road.     A. I did.

Q. When did you learn of it?

A. On the 18th of October.

Q. Did you visit the location of the fire?

A. I did.

Q. When did you visit it?

A. On the morning of the 19th.

Q. How did you happen to visit there?

(Testimony of E. A. Southworth.)

A. A. A. Wilson was finishing up a concrete bridge at Halawa, and I left Hilo on the morning of the 18th, on the "Mauna Kea," and arriving at Mahukona, I was informed by Mr. Elgin, manager of the railroad company that a fire had occurred, either on the bridge or on the road work, I do not recollect. [86—61] Naturally this created a good deal of interest between the contractor and myself, and we endeavored to go over that afternoon, but there was a little work over there, so we didn't get into the district till early the next morning.

Q. Of what date?      A. The 19th.

Q. Did you visit the scene of the fire?

A. Yes.

Q. At that time?      A. Yes.

Q. What did you do there?

A. I went over the bridge work with Wilson.

Q. Where was that bridge with reference to the location of the fire?

A. A very short distance from the place where the fire started on the public road. We went over the conditions existing there on the plantation as had been requested to find out what the conditions were, and I proceeded to take a series of photographs showing the condition of the fields and the origin of the fire.

Q. Have you a set of those pictures or photographs that you took at that time?      A. I have.

Q. I will show you a picture, or photograph, Mr. Southworth, and ask you if you recognize it?

A. I do.



(Testimony of E. A. Southworth.)

Q. State what it is?

A. That is a photograph showing the embankment that was covered with this lauhala forest, illustrating the location where the fire started immediately back of the storehouse, they had in connection with the bridge construction. [87—62]

Mr. OLSON.—I will now offer this photograph in evidence.

Mr. HEEN.—No objection.

The COURT.—It may be received and marked Plaintiff's Exhibit 1.

Q. Referring you then to Plaintiff's Exhibit 1, concerning which you have just testified and just identified, I will ask you to state in addition to what you have already stated, what that represents?

A. Represents where the fire started.

Mr. HEEN.—I move to strike the answer, as being based on hearsay.

No objection.

Q. Referring you to Plaintiff's Exhibit 1, Mr. Southworth, I refer you to the figure of a man in a white shirt or coat some little distance from a building or shed alongside the road, and I will ask you if you observed the conditions existing at that point when you took that picture?

A. Yes, I observed the conditions existing there at that time.

Q. What did you observe at that point where that man is standing in the picture?

A. There was a burned section of lauhala and brush.

(Testimony of E. A. Southworth.)

Q. Where was that burned section with reference to the pali and the road?

A. Right where the man is standing alongside the pali, right along the side of the road.

Q. At the beginning of the pali?

A. Yes. [88—63]

Q. Just explain how that appeared at that time?

A. The whole section there was charred, the grass and the brush along the side of the hill was burned.

Q. Referring to the pali, can you mark on the photograph the point at which the *plai* ended and the slope above began?

A. That is divided very clear right here above the man's head.

Q. I will ask you to mark with this pencil with an X the point above the rubbish, where the pali left off and the slope above began. Have you done so?

A. I have.

Q. I will ask you to tell the jury what was the condition of the pali up to that point as you observed it on the morning of October 19th, from the rubbish heap up?

A. The pali at this point had been charred, all the rubbish existing above there in the way of leaves, brush and grass that had been accumulating there for months past had burned immediately away from where the fire had started, and naturally spread under the trees.

Q. Now, explain what the condition of the pali was as to whether there was any vegetation?

(Testimony of E. A. Southworth.)

A. There was a lot of dry vegetation.

Q. Explain a little further what you mean by that?

A. Weeds and brush that had been growing, dying down and accumulating leaves, trees fallen, and other grass made quite a mass of dry material of some considerable depth.

Q. It was dry, was it?

A. I should say it was exceedingly dry. That was a dry section in there and protected. Naturally the trees there protected that section from dampness, even the dews over night, and it was what I consider just a dry bunch of rubbish, trash and lauhala leaves.  
[89—64]

Q. What would you say from what you could observe had been the conditions there prior to the fire?

A. It was very apparent the whole section was dry there, it couldn't be otherwise.

Q. As to whether or not there had been some dry vegetation and leaves there?

A. It was a very pronounced fact that the whole hillside was dry, it was a dry season.

Q. How near was this pile of rubbish you observed at the foot of the pali at the side of the road, to the pali?

A. Right next to the pali in the gutter of the road.

Q. What was the condition as to whether or not there had been such vegetation as you have described above the rubbish pile on the side of the pali?

A. It showed an effort had been made to clean this dry brush and weeds on the side of the roadway, and

(Testimony of E. A. Southworth.)

in this cleaning up they had piled this material together there.

Q. Directing your attention to the burned material left on the side of the pali, immediately adjoining the rubbish pile, describe that as to what it was?

A. That material there was entirely consumed by the flames, but adjoining on either side was just this dry material, just dead rubbish or weeds growing there and dying down continuously.

Q. I will ask you to explain what was the condition of the slope above the pali which you have marked at the beginning with an X on Plaintiff's Exhibit 1?

A. The slope above the pali was a gentle rise, and was overgrown with these lauhala trees. [90—65]

Q. On the picture, I observe on the side of the pali certain darkened areas and other lighter areas, what does that represent?

A. The darkened areas, are the areas burned, charred material left there from the lauhala leaves being consumed by the flames, and the outer edge the portion not consumed by the flames.

Q. How much of the area on the slope above the pali was burned?

A. It started in there with a V-shaped section immediately above the first charred spot and spread out, I imagine somewhere in the neighborhood of 150 feet at the top and went through the trees.

Q. How far did the burned area extend through the slope and through the trees?

A. Continuous.

Q. Up to what point?



(Testimony of E. A. Southworth.)

A. Up on top of the hill.

Q. What began there?

A. The cane field started there.

Q. Adjoining this burned area?      A. Yes.

Q. Directing your attention now to another photograph, which I hand you, I will ask you if you can identify that as a photograph taken by you on that day?      A. I can.

Q. Representing what?

A. That was taken from mauka of the burned tract, looking down towards the ocean.

Q. It represents the burned field of cane?

A. Yes. [91—66]

Mr. OLSON.—I now offer this photograph in evidence, if the Court please.

No objection.

The COURT.—It may be received, and marked Plaintiff's Exhibit 2.

Q. Does that represent the whole area?

A. No, as much as could be taken from that point.

Q. Referring you now to Plaintiff's Exhibit 2, being a photograph just identified by you, and which has been allowed as evidence, and which you testify represents a section of the burned area of the cane field above, mauka of the Government road, now go on and explain a little further what that picture represents?

A. The row of trees that is shown here are the trees that are planted alongside of the Government road, and down below here the roadway winds down

(Testimony of E. A. Southworth.)

into the gulch, that is where the fire came over the hill.

Q. Please mark that point with the letter X.

You have now marked with the letter X the point where the fire came over the hill from the road?

A. Yes.

Q. Is there anything else you can explain with reference to that photograph?

A. No, nothing else.

Q. These trees referred to, what kind of trees are they?

A. Large pines along the Government road, no lauhala trees there at all, that is down in the gulch.

Q. I will now refer you to another photograph or picture and I will ask you if you can identify that photograph? A. I can.

Q. Was that taken by you at the same time that the other pictures were taken? [92—67]

A. It was.

Q. What does that represent?

A. That represents the standing cane after the fire had gone through it.

Mr. OLSON.—I will now offer this photograph in evidence.

No objection.

The COURT.—It may be received and marked Plaintiff's Exhibit 3.

Q. Referring you now to Plaintiff's Exhibit 3, identified by you, and which you have stated represents a section of the area of the burned cane, showing the burned cane itself, I will ask you if there

(Testimony of E. A. Southworth.)

is anything in that photograph representing anything else, any object?

A. Yes, there is a parasite box there.

Q. Will you mark that parasite box on the photograph by making the letter there?

You have now, as I understand it, marked the point just above the box with the letter X?

A. Yes.

Q. What kind of a box was that?

A. That was a wooden box in which they put cane parasites to kill off the leaf hoppers.

Q. Did you observe that box when you took the picture? A. I did.

Q. Please explain what the condition of it was.

A. The box was not burned, just merely charred, blackened.

Q. How thick was it?

A. I imagine it was made out of one-inch lumber.

[93—68]

Q. Describe if you will the condition of the burned cane, how much of it had been burned at this point where the picture was taken?

A. The leaves were entirely burned off the cane and right at the top even the little green leaves. Naturally the cane itself wouldn't be very much burned, it was sticking up and was charred just like this box.

Q. Did you observe any other parts of the cane that had been burned beside this point? A. I did.

Q. How did it compare with it in appearance?

A. You will note in that second photograph, look-

(Testimony of E. A. Southworth.)

ing toward the sea, it is almost entirely consumed there, very much more so than what it was here.

Q. Referring, are you, to Plaintiff's Exhibit 2?

A. Yes, that is the one. You can note the amount of difference in the burning of the cane, that one there shows the cane very little effected, the cane itself, you can see the joints, not consumed by the flames.

Q. Referring to Plaintiff's Exhibit 3? A. Yes.

Q. I will show you another photograph and ask you if you can identify that? A. I can.

Q. Was that taken by you at the same time as the others? A. It was.

Q. What does that represent?

A. That represents the cutting of the canes that had been burned.

Q. In the same field?

A. Yes, and it also shows the Halawa schoolhouse.

[94—69]

Mr. OLSON.—I now offer this photograph in evidence.

No objection.

The COURT.—It may be received and marked Plaintiff's Exhibit 4.

Q. Referring now to exhibit 4, and calling your attention to the loaded wagons appearing in the picture, what does that area represent where those wagons are?

A. The area that had been cut and loaded for hauling down to the mill. I believe those wagons went over to the adjoining mill.



(Testimony of E. A. Southworth.)

Q. When did you first observe the operations in connection with the cutting and loading of that cane?

A. On the morning of the 19th of October.

Q. I will show you another photograph, and ask you if you can identify that? A. I can.

Q. What is it? A. It shows—

Q. That was taken at the same time as the others?

A. Yes.

Q. Showing part of the burned area through which the fire swept? A. Yes.

Mr. OLSON.—I now offer this photograph in evidence.

No objection.

The COURT.—It may be received and marked Plaintiff's Exhibit 5.

Q. Please state what this shows as you observed it, referring to Plaintiff's Exhibit 5? [95—70]

A. It shows the cane that has been cut in the heart of the field, making a roadway in the standing cane through the area that was burned, the stool cane sticking up on either side of the furrows is illustrated in that.

Q. Did it indicate when it had been cut?

A. No.

Q. Had the fire swept that portion of the field represented by that picture?

A. Both sides of that were consumed by the flames.

Q. I will show you another picture or photograph and ask you if you can identify that?

A. Yes, I can.

Q. Was that picture taken at the same time as the

(Testimony of E. A. Southworth.)

others? A. It was.

Q. Was that part of the area swept by the fire?

A. It is.

Mr. OLSON.—I will offer this photograph in evidence.

No objection.

The COURT.—It may be received and marked Plaintiff's Exhibit 6.

Q. Referring you now to Plaintiff's Exhibit 6, I will ask you what that shows as you observed it?

A. It shows the width of the plantation roadway.

Q. That runs from—

A. From the Government road up to the Halawa Mill, and shows the cane that was burned on both sides of the roadway, and the distance the flames leaped from one field to another. [96—71]

Mr. HEEN. I object to "the distance the flames leaped," it being a conclusion of the witness and probably based on hearsay.

Mr. OLSON.—I have no objection, it may be stricken.

Q. I will ask you, Mr. Southworth, how that road is located with reference to the point where the fire started, whether it runs across or parallel with that point and the course of the fire?

A. The course of the fire was from east to west and the roadway runs from north to south, or mauka and makai.

Q. I will ask you whether or not as you observed the conditions about that road, whether or not the cane had been burned on both sides of the road?

(Testimony of E. A. Southworth.)

A. It was burned on both sides of the road.

Q. That is the road known as the section road?

A. Section road.

Q. How far did that fire extend beyond that section road?

A. Clear over to the gulch, Halawa gulch, just back of the schoolhouse where that photograph was taken.

Q. How wide was that road would you say; judging from your memory?

A. I should think about between 25 and 30 feet, something like that.

Q. I will show you another photograph and ask you if you can identify that?      A. I can.

Q. Does that also show a section of the burned cane observed by you that morning?      A. It does.

[97—72]

Mr. OLSON.—I will offer this photograph in evidence.

No objection.

The COURT.—It may be received and marked Plaintiff's Exhibit 7.

Q. Referring now to Plaintiff's Exhibit 7, I will ask you what that shows.

Q. That shows the work in the cutting of the field there that had been burned and loading the wagons with the burned cane.

Q. From what direction was that picture taken?

A. I have forgotten now; I will have to take a look at it. That is looking up mauka in the opposite direction from the other one taken toward the mill.

(Testimony of E. A. Southworth.)

Q. Looking uphill toward the mill?

A. Yes. It shows that roadway also, that section road.

Q. I call your attention now to another photograph or picture, and will ask you if you can identify that? A. I can.

Q. Was that also taken by you at the same time, the morning of the 19th of October, as the other pictures? A. It was.

Q. Taken at, or in the neighborhood of this fire?

A. Yes, right from the burned field itself.

Mr. OLSON.—I will now offer this photograph in evidence, if the Court please.

No objection.

The COURT.—It may be received and marked Plaintiff's Exhibit 8.

Q. Calling your attention to Plaintiff's Exhibit 8, I will ask you to explain what that represents. [98—73]

A. That represents a portion of the cane field that was not burned, taken from the burned section already cut.

Q. I will ask you where that section was situated with reference to the Government road, as well as the burned sections of the cane field?

A. That section was a narrow strip immediately mauka of the Government road.

Q. On which side of the bridge which has been referred to?

Q. On the west side, the Halawa side of the bridge.

Q. What direction does the Government road run



(Testimony of E. A. Southworth.)

where it joins this unburned area of the cane?

A. It runs along there parallel to the beach.

Q. That would be east and west? A. Yes.

Q. How wide would you say that section of unburned cane was, can you remember?

A. Less than 200 feet in its widest place there.

Q. What was the location, or what would you say about the location here of this unburned area, as compared with the lay of the land of the burned section adjoining?

A. It was extended from the point at the gulch road that runs down into the gulch, extended along the fence line of the Government road toward the Halawa schoolhouse, being a small narrow strip.

Q. I mean the lay of the land as compared with the burned section?

A. It was lower; it sloped off gradually down to the Government road, lower *elevation* than up above where the fire was. [99—74]

Q. You have stated that this unburned section had a decline down toward the Government road, how was the lay of the land of the burned section, did that also have an incline?

A. There was just a gradual incline right up toward the mill.

Q. About how far did that unburned section extend in length, you have already stated the width approximately?

A. I don't think it would be much over a quarter of a mile along there from the point down by the

(Testimony of E. A. Southworth.)

schoolhouse over to the gulch, I guess about a quarter of a mile.

Q. I will show you another photograph, Mr. Southworth, and ask you if you can identify that?

A. Yes.

Q. Was that taken at the same time as the others?

A. Yes.

Q. Does that also show a portion of the cane field, a part of which was burned and a part unburned?

A. That shows a part not burned.

Mr. OLSON.—I will offer this photograph in evidence.

No objection.

The COURT.—It may be received, and marked Plaintiff's Exhibit 9.

Q. Referring now to Plaintiff's Exhibit 9, you have stated it shows the part not burned, do you mean by that all that was not burned?

A. No, it was a close view looking towards the cane that existed in the field.

Q. By the way, there are figures of two men standing there, who are they? [100—75]

A. That gentleman with the coat on is Mr. Wight, manager of the plantation, and the other is a workman.

Q. Mr. Wight, the manager of the Halawa Plantation, Limited? A. Yes.

Q. Mr. Southworth, I will ask you whether you were familiar at that time with the conditions, the Weather conditions prevailing in Kohala?

A. I was.

(Testimony of E. A. Southworth.)

Q. What had been the condition of the weather for, say some weeks prior to the 18th day of October, 1912?     A. Dry.

Q. How long had you been county engineer at that time?     A. About two years.

Q. What were your duties in connection with that office, that position?

A. My duties were to act as surveyors, supervision of the construction of roads, highways, public buildings and things directly within the internal improvements of the county.

Q. Have you had experience in the general construction of highways and roads?     A. I have.

Q. For how long?     A. About ten years.

Q. Are you familiar with the trade winds that blow in Kohala?     A. I am.

Q. Describe, then, just what the ordinary trade of Kohala is?

A. The trade wind of Kohala is a wind off the ocean directly on the far-reaching arm, north point of that district.

Q. How does the ordinary trade wind blow, aside from the direction?     [101—76]

A. What they call a stiff shore breeze there.

Q. At this point where the fire took place, what would you say about the ordinary trade wind—

A. Being high on the bluff, it would be exposed to the ocean winds, no trees or anything to shelter this particular spot.

Q. Did you observe the road there in the vicinity, in the neighborhood of this fire, when you were

(Testimony of E. A. Southworth.)

there? A. I did.

Q. I will ask you whether or not there was any other place along that highway in the near vicinity of this point where this pile of rubbish was burned, where the rubbish could have been safely burned?

A. There is.

Q. Where? A. On the other side of the road.

Q. And what about mauka or makai?

A. Makai.

Q. What about the location of the bridge?

A. The bridge is a concrete bridge; you couldn't burn that.

Q. I mean could it have been burned there safely; I mean the location on the road?

A. There was a building alongside the bridge there at that *particular, where* the laborers stored their material; couldn't very well have been burned there.

Q. What does that bridge cross?

A. If I remember correctly, I think it is about 30 feet.

Q. What does it cover, what does it go over?

A. Goes over a stream. [102—77]

Q. I will ask you whether that rubbish such as that burned there could have been thrown into that stream without any difficulty?

A. I presume it could, yes.

Q. How far was that bridge from the point where you observed the burned rubbish pile?

A. About 100 feet.

That is all. [103—78]



(Testimony of E. A. Southworth.)

Cross-examination of E. A. SOUTHWORTH.

Q. You say you are familiar with the trade winds in Kohala?     A. Yes.

Q. And the trade wind blows in what direction?

A. Blows from the northwest there across the Island.

Q. From the northwest, that is from that direction towards say the *woutheast*?

A. No, it comes across from the east, across to the northwest.

Q. You said that the conditions were pretty dry, the weather was dry before the fire occurred?

A. Yes.

Q. When were you in Kohala last, prior to that fire?

A. I guess it was in the neighborhood of about three weeks, I was over there prior to that and it had been dry, the roads were dry at the time, it was very noticeable they had a dry spell there.

Q. What was the height of the top of this hill at the point where you saw the burned rubbish on the road, way up on top?

A. I judge the elevation there from the roadway was possibly 75 feet.

Q. And the land at that point was it lower than the land at the point where there was some cane left, that is the unburned area?

A. No, that was higher over on the mound.

Q. How much higher?     A. Quite a little bit.

Q. The road at that point was very much lower than the road, that is the main Government road at

(Testimony of E. A. Southworth.)

the junction of the section road? [104—79]

A. Yes, indeed. It was on a grade going down across at the bridge at this stream and that difference in elevation is overcome there and coming from the main road back in the gulch and from the stream itself there must be another additional elevation there of possibly a little over 25 feet, making a little over 100 feet in elevation from the top of this hill to the bottom of the gulch where the roadway crosses at the bridge.

Q. Referring to Plaintiff's Exhibit 2, you have on this photograph a point marked X showing the place where the fire came over on the hill? A. Yes.

Q. This lighter portion of the picture above the X shows another hill in the distance, what is that?

A. Shows where the gulch comes down, here immediately after the end these trees start a descent and go down the gulch, the road turns and crosses the stream about where that X is, and the X on the other side of that is the bluff, and then the horizon of the ocean beyond that. That is a little gap there.

Q. This little hill? A. Yes, coming right down.

Q. Going right to the point X? A. Yes.

Q. Referring you to Plaintiff's Exhibit 3, showing a portion of the burned cane, in which picture is this box you have referred to as a parasite box, how was that cane burned?

A. In the cane here, the leaves were stripped right off, that cane has not been burned, only charred, that shows the difference between the standing cane in this portion and the other. [105—80]

(Testimony of E. A. Southworth.)

Q. Referring you to Plaintiff's Exhibit 9, what cane field does that picture show?

A. Shows the same cane that you saw in this last one where the fire had gone through it, it shows just what the opposite conditions are of the cane field that has not been burned and the one that has been burned.

Q. Is that the portion of the unburned area in that same piece of land?

A. Yes, the makai section that was not burned.

Q. Referring you to Plaintiff's Exhibit 8, is that also a picture of a portion of the unburned section?

A. Yes, that is near the road.

Q. What roadway is that?

A. Section road, runs into the Government road.

That is all. [106—81]

**[Testimony of Kahino, for Plaintiff.]**

Direct Examination of KAHINO by C. H. OLSON.

Q. What is your name? A. Kahino.

Q. Where do you live? A. Halawa.

Q. How long have you lived there?

A. Very near twenty years.

Q. Were you working for the County of Hawaii in the last few months of 1912? A. Yes.

Q. What was the work? A. Road work.

Q. I will ask you if you were working on the road, the North Kohala road, in the Aamakau section thereof, on the 18th day of October, 1912? A. Yes.

Q. Do you remember a fire which took place there on the morning of that day? A. Yes.

Q. Who was your luna there on that road?

A. Koolau.

(Testimony of Kahino.)

Q. Do you know Naipo?     A. Yes.

Q. He was the road overseer?     A. Yes.

Q. From whom did you get your pay, from the county?

A. Our pay from the County of Hawaii. We went to the road overseer. [107—82]

Q. How long had you been working for the County of Hawaii as a road laborer prior to that date?

A. Not very long, started work at seven o'clock.

Q. Yes, but you had been working before that for the County of Hawaii?     A. Yes.

Q. What time did that fire start?

A. Between seven and eight.

Q. Who set the fire, who lighted the fire?

A. Koolau.

Q. What did he set fire to?     A. Rubbish.

Q. Where was the rubbish?

A. On the road where we commenced working.

Q. How near was that to the new bridge on the road there?     A. I don't know.

Q. Was it near it?     A. Kind of close.

Q. What side of the road was the rubbish piled, on the side toward the pali or away from it?

A. On the side of the road next to the lauhala pali.

Q. How close to the pali?     A. Close to the pali.

Q. You mean right next to the pali?

A. Myself and Koolau had gathered together rubbish. Koolau had instructed me to set fire to this rubbish; I turned around and saw a woman coming down, and I didn't think anything more about setting fire to this rubbish pile.



(Testimony of Kahino.)

Q. You turned around and saw a woman coming down, was that the reason you didn't set fire to the rubbish?     A. Yes. [108—83]

Q. You didn't want to set fire to it, is that it?

A. Yes.

Q. Why?

A. I thought if the fire was started it would scare her horse.

Q. Did you have any other reason why you didn't want to set fire to the rubbish?     A. No.

Q. How was the wind blowing that day at that time?     A. Prevailing wind of that place.

Q. That comes from what side, the Hilo side, or the other side?     A. Hilo side.

Q. That is from the east then, is it not?     A. Yes.

Q. Was it blowing toward the pali?     A. Yes.

Q. Now then, coming back to the position of this rubbish pile, was it right up against the pali, was it a foot from it, or how was it?

A. Right close to the pali.

Q. How high was the pali?

A. I think about four feet.

Q. If you stood up along side of this pali like I am standing here by the side of the wall, how much higher was the bank than your head, or was it lower than your head?

A. I think about a foot over my head to get the upper edge.

Q. Now hold up your hand and point out how high you think that pali was above your head.

A. I think from there to the dirt below (indicating

(Testimony of Kahino.)

about six feet high). [109—84]

Q. Do you mean as you indicate here on the wall, that it is that high from the floor you are standing on (witness box) or the floor I am standing on down here? A. From the main floor.

(Counsel stipulate about 6½ feet.)

Q. It being about two years ago since this took place, is it possible that you might be a little bit in error in that regard, it might be a little bit higher, or you are not absolutely certain about the exact height?

A. What I said before was wrong.

Q. What was that? A. I said four feet before.

Q. And that is wrong, you mean? A. Yes.

Q. Now then, referring to this wind blowing as you say, from the Hilo side toward the pali, what kind of a wind was it, how strong was it blowing?

A. Strong, ordinary prevailing wind there.

Q. Same kind of trade wind you have in Kohala when the trade winds are blowing ordinarily?

A. Yes.

Q. Now I will ask you if you noticed whether there was any particular change in that wind from the time the rubbish pile was lighted by Koolau, until the fire caught up on the pali? A. Yes.

Q. Was there a change, do you mean?

A. After the fire was lighted, it was strange.

Q. How long after the fire was lighted?

A. Not long. [110—85]

Q. Do you mean before, or after the fire got up on the pali?

(Testimony of Kahino.)

A. When the fire was lighted the wind was then blowing.

Q. Did it keep on blowing afterwards? A. Yes.

Q. Same as before? A. Yes.

Q. Where did the fire go to after it got caught in the rubbish up on the pali?

A. Went into the puahala, lauhala trees.

Q. Was it after it got up there in the puahala that you noticed that the wind was strange? A. No.

Q. When was it? A. When the fire was lit.

Q. How was it strange? A. Whirling wind.

Q. Have you seen those before? A. No.

Q. Never seen a whirlwind before?

A. Before that time we were working I seen them.

Q. Had you ever seen them where there were fires burning before? A. The fire had just been lit.

Q. I mean other fires, have you seen gusts and whirlwinds like that about other fires before?

A. Yes.

Q. Now then, I will ask you where this rubbish came from that was set fire to by Koolau?

A. From the side of the pali, gathered by Koolau and myself.

Q. Was it right in front of this rubbish pile where this had been gathered? [111—86]

A. The rubbish had been gathered together and was set on fire.

Q. Where did that rubbish come from?

A. Rubbish that had fallen down from the lauhala trees.

Q. Where was it, in the ditch alongside the road?

(Testimony of Kahino.)

A. Yes.

Q. Right on the pali in front of this rubbish pile, I will ask you whether or not the grass and weeds and stuff had been pulled off the pali?

A. Where the men were working the rubbish had been removed, back of them where they were not working the rubbish still remained.

Q. I am asking you if the rubbish had been removed from the pali right by the rubbish pile?

A. That is the rubbish that was gathered together in that pile.

Q. Had the rubbish, the grass and weeds and stuff been taken down from the pali right there where the rubbish was lying that was set on fire? A. Yes.

Q. It had been taken down from there, hadn't it?

A. Where the men were working it had been gathered together and piled up there.

Q. Now, where were the men working with reference to the place where the rubbish pile was?

A. Right above where this pile of rubbish was.

Q. Now, where did the fire catch on the pali from the rubbish pile?

A. Behind the man who was cleaning the rubbish off the pali.

Q. Who was that man?

A. Joe Puna. [112—87]

Q. He was working there? A. Yes.

Q. Was there any grass still left on the pali side there after it had been cleaned in front of the rubbish pile? A. Yes.

Q. Did the fire catch in that grass on the pali from



(Testimony of Kahino.)

the rubbish pile? A. Yes.

Q. When did you first see that the fire had got away from the rubbish pile, and was burning on the pali?

A. When we were working there.

Q. What did you do when you saw it caught fire on the pali?

A. I told our luna that the fire was up there, and we couldn't stop it.

Q. What work were you doing at the time Koolau set fire to the rubbish pile?

A. When Koolau set fire to the rubbish pile, I was on the side of the road.

Q. Near the rubbish pile or far away from it?

A. No.

Q. Not near the rubbish pile, is that what you mean? A. No.

Q. How far away would you say you were from the rubbish pile?

A. Same as the width of the road.

Q. Were you on the same side of the road as the rubbish pile, or the opposite side?

A. The pile of rubbish was on the mauka side, and I was on the makai side.

Q. What were you doing over there? [113—88]

A. I was intending to set fire to this rubbish pile, when I happened to turn around in the opposite direction and seen a woman coming, so I did not set fire to the rubbish pile.

Q. What were you doing on the other side of the road when Koolau set fire to the rubbish pile?

A. I wasn't doing anything.

(Testimony of Kahino.)

Q. When did you first see that the fire had spread from the rubbish pile to the rubbish on the pali?

A. After Koolau set fire to this rubbish pile, I don't think it was ten minutes, I noticed the fire had jumped up to the rubbish on top of the pali.

Q. Just describe how that rubbish pile burned, meaning by that how high the flame reached from the rubbish pile while it was burning.

A. I think about three feet.

Q. Just describe what happened. You saw Koolau set fire to the rubbish pile, now describe how it burned, was it rapidly or slowly? A. Rapidly.

Q. Where was Joe Puna at that time?

A. Above this pile of rubbish which was burning.

Q. Did you see what Joe Puna did when the fire began to burn there? A. Yes.

Q. What did he do?

A. He was cleaning rubbish on the side of the pali, throwing it down below, we were gathering it together and burning it up.

Q. After the fire got started well and was burning, what did Joe Puna do? [114—89]

A. When the fire got very strong, Joe Puna couldn't stand it where he was.

Q. What did he do?

A. Koolau, our luna, told Joe Puna to attempt to put out the fire which had caught on the pali.

Q. You say it got too hot for him, or he couldn't stand it, what did he do, or where did he go, or did he stay there?

A. He came back here, back of the fire.

Q. Where was the fire burning on the pali then,

(Testimony of Kahino.)

where he was standing, below him, or above him?

A. As this fire got burning good in this pile of rubbish, and the heat became too intense, Joe couldn't stand there any longer and backed up away from the fire.

Q. What I want to find out is whether or not at the time Joe Puna left the place on the side of the pali where he was working, if at that time the fire had got started burning in the rubbish on grass on the side of the pali?

A. After Joe Puna—after the fire got going in pretty good shape, Joe moved out of that place. At that time the fire went behind him and caught on the rubbish on the side of the pali.

Q. Now in testifying, you spoke of a gust or whirlwind that you observed there, now just state what word you used to denote that expression, what Hawaiian word was it that you used there?

Question withdrawn.

Q. Yesterday in speaking of this wind you used a word, which I believe was as follows, did you say puahia or puahiohio? A. Puahiohio. [115—90]

Q. Now I want you to state just what you meant to say when you used that word. Explain it in your own language and the interpreter will interpret it into English. Explain what kind of wind it was.

A. Like something whirling.

Q. Was the wind whirling at that time or was it a gust shooting up?

A. The prevailing wind of Kohala.

Q. That is what it was? A. Yes.

(Testimony of Kahino.)

Q. Nothing different from that?

A. That is the prevailing wind of Kohala.

The COURT.—In view of the fact that the interpreter is not familiar with that word, will counsel stipulate as to what that word is?

Mr. OLSON.—I will agree that the word “pua-hiohio” means whirlwind.

Q. I will ask you if you placed any green leaves on this rubbish pile?

A. Before the fire was started.

Q. Where did you place them?

A. On top of that pile of rubbish which we had gathered together, Koolau and I.

Q. I will ask you, Mr. Koolau, if you have not already stated, if you did not state to Mr. Holstein, after you were called here as a witness, after you had been subpoenaed as a witness, that while there were some green leaves, that it was all mixed up together with the rubbish, and not placed on top, [116—91] did you not so state to Mr. Holstein?

A. No.

Q. You didn't say anything of that kind?

A. No.

Q. Now, after this fire got started on the pali, just state what became of it, where did it go to?

A. Went into the growth of Lauhala.

Q. Up above?

A. Yes, above where we were working on the road.

Q. Did it spread rapidly or slowly?

A. Slowly.

Q. And after it had gone through this growth you



(Testimony of Kahino.)

have spoken of on the pali, or above the pali, where did you to go?

A. I went up on the side where this fire was going, and removing the rubbish.

Q. What for?

A. I saw that the fire was too strong and we couldn't subdue it.

Q. You say it was too strong and you couldn't subdue it, what became of it?

A. Went through this growth of lauhala and into the cane.

Q. Where was Koolau at the time the fire got on to the side of the pali? A. There.

Q. Where were Hanalukala, Poe and Kukui?

A. They was at another place, working.

Q. Were you at this place, this same place when Naipo got over there after the fire was over?

A. I didn't see Naipo.

Q. You didn't see Naipo the next day?

A. I saw him afterwards, the day afterwards.

Q. Where was that? [117—92]

A. At Halawa.

Q. What did Naipo do?

Mr. HEEN.—I object to the question as being immaterial, irrelevant, incompetent, does not tend to prove or disprove any of the issues in this case.

Question withdrawn.

That is all. [118—93]

Cross-examination of KAHINO by W. H. HEEN.

Q. In your direct examination, one part of it, you said this wind was a strange wind, do you mean by

(Testimony of Kahino.)

that it was an unusual wind, didn't see that kind of wind before?     A. Yes.

Q. You described this fire as, or rather the flames of the fire, raising to about three feet, that is correct?

A. I said the depth or the thickness of the rubbish was three feet.

Q. Before the strange wind, the unusual wind appeared upon the scene, how high were the flames?

A. The fire started on the side of the pile of rubbish and gradually worked up on top.

Q. That is before the strange wind appeared?

A. Yes.

Mr. OLSON.—After the fire got started burning in the rubbish pile real well, and before the fire caught on the pali, how high up did the flames go from the rubbish pile?

A. Six feet and over. Same as the height of the pali.

Mr. HEEN.—When the flames reached six feet and over, was that the time this strange wind arrived?

A. After the fire had caught on top of this pile of rubbish that was when this strange wind came and lifted the flames up to the pali. [119—94]

Q. Just before the strange wind arrived, how high were the flames above the top of the pile of rubbish?

A. The fire had just been started there by Koolau.

Q. You say that the fire appeared upon the pali fully ten minutes after it was lit, you recall that testimony?     A. Yes.

Q. When you saw the fire on the pali, was that about the same time when the strange wind arrived?

(Testimony of Kahino.)

A. When the fire had been started to this pile of rubbish, and was lit above the pile, that was the time when that strange wind came.

Q. This strange wind came out long after the fire was started, give us your best judgment?

A. Not very long.

Q. About how long, five minutes, ten minutes?

A. I don't know, I have no watch, I couldn't tell.

Q. You know it wasn't one hour afterwards?

A. That was too long.

Q. Half an hour too long?      A. Too long.

Q. Ten minutes?

A. Ten minutes the fire was burning intensely.

Q. So, to the best of your judgment, it was about ten minutes after the fire was started that this strange wind arrived?      A. No.

Q. Was it longer than ten minutes?

A. Under ten minutes.

Q. Was it between five and ten minutes?

[120—95]

A. Perhaps between five and ten minutes.

Q. When Koolau told you to light this fire, how long before Koolau actually lit the fire was it when he told you?

A. I think quarter of an hour.

Q. He told you that there was a rubbish pile ready to be set on fire?

A. We was burning up the rubbish that time.

Q. How long after you were told to set fire to this rubbish was it when the woman came by?

A. Quarter of an hour, just as I said before.

(Testimony of Kahino.)

Q. During that time while you were preparing this rubbish pile, and to the time when the woman appeared, there was a very light breeze, was there not?

A. Wind that time.

Q. The wind was a light breeze, wasn't it?

A. Yes.

Q. And this light breeze was still blowing when Koolau put the match to the pile? A. Yes.

Q. Before the fire was lit, or before the time you intended to set fire to this rubbish, did you have in mind the possibility of the rubbish on the pali catching on fire? A. I thought of that.

Q. And bearing that in mind at that time, you cleared all the dry stuff along this pali for, say, a distance of about nine feet, that is, to the top?

Question withdrawn.

Q. Bearing in mind that there might be a possibility of the rubbish on the pali catching on fire, did you do anything towards preventing such a thing happening? [121—96]

A. There was a man placed up there removing rubbish on the side of the pali.

Q. And this man was right in front of the rubbish pile?

A. Right above this pile of rubbish.

Q. About half way up that bluff?

A. About six and a half feet up.

Q. And did you collect the rubbish on the sides so that the fire might not extend too far?

A. The rubbish that Joe threw down on to the road, that is what I gathered up.



(Testimony of Kahino.)

Q. Before you intended to set fire to this rubbish, did you make sure that there was no more dry stuff, no more rubbish on the side there immediately in front?

A. I saw that in *front Joe*, where Joe was working, there was no rubbish, behind him there was rubbish that had not been cleared off.

Q. When you saw rubbish behind him, you mean beneath him or to one side?

A. Behind where he was working.

Q. He was working looking towards the bluff, was he working that way?

A. He was standing with his face towards the bluff, and behind him was where the rubbish had not been removed.

Photograph shown to witness.

Q. Do you recognize this house which appears in the photograph as being the warehouse or store house?

A. Warehouse.

Q. About at what point in this picture was the fire started? [122—97]

A. Over here, that side was started.

Q. Pointing to what?

A. We was working there together, that is where the fire started.

Q. About how far away from the store house?

A. I should judge about somewhere from here to the gate from the warehouse to the place where we were working.

(Counsel stipulate about 75 yards.)

Q. Was there a slant to this hill where Joe Puna

(Testimony of Kahino.)

was standing?     A. Yes.

Q. He was about six and a half feet from the ground?     A. Yes.

Q. Now, how much slant was that little hill?

A. Quite a slant to the place where Joe was working.

Q. And Joe Puna was about half way up working?

A. Not half way.

Q. I mean half way of the first slant from the road.

A. Yes.

Q. Supposing this wall is the bluff, show us how he was standing while he was cutting this rubbish.

A. He was standing in this position, and with his hands he was removing the rubbish. (Indicating that he was standing sideways towards the pali, facing towards Kona.)

Q. Do you know that new bridge there?

A. Yes.

Q. And his back was towards that bridge?

A. Yes, his back was towards that bridge. [123—98]

Q. Which side of him was cleared, in front of him or in back, that is to say, was he working forward or backward, as he was clearing the side of the bluff?

A. He was working backwards.

Q. This pile of rubbish was how big, about?

A. Three feet in height.

Q. And how long?     A. Over six feet.

Q. About how wide was it, the width of the ditch on the side of the road?

(Testimony of Kahino.)

A. A little over two feet, I think.

Q. This ditch was how deep?

A. Not very deep.

Q. Say about a foot deep or more than that?

A. A foot and a half.

Q. This pile of rubbish was composed of dry leaves, twigs and also green leaves all mixed together?

A. Yes.

Q. When the rubbish, or the pile, was put together in this manner, was there any more rubbish on the side of the pile, either side of the pile, in the ditch?

A. We had gathered together all the rubbish on that side and on this side in one pile.

Q. How wide a space up this bluff had been cleared of this rubbish?

A. Not very wide, we had started work at seven o'clock.

Q. This fire was started when after seven?

A. Sometime between seven and eight.

Q. Was it beyond half past seven? [124—99]

A. No.

Q. So it was between seven and half-past seven?

A. Yes, I think about that time.

Q. Could you have been working about twenty minutes or fifteen minutes before the fire was started? Give us your best judgment as to how long it was after you had started to work.

A. I think we had been working about a quarter of an hour.

Q. During that time, that is, before the fire started,

(Testimony of Kahino.)

Joe Puna was the only one cleaning the side of the bluff?     A. Yes.

Q. What was it that he cleared off the side of the cliff, or bluff?

A. He cleared off all the rubbish, and then dug out the dirt.

Q. Well, at this particular place where he was working, it was rocky, wasn't it?

A. Rock and dirt.

Q. And the growth was not very thick, was it?

A. Not very much, the grass was very thin, it was a dry spell in Kohala that time.

Q. Tell us just about how much space on this bluff had Joe Puna cleared up before the fire was started?

A. I think about five feet wide.

Q. Well, about how high?

A. About a foot above his head.

Q. About a foot above his head as he was standing in the middle of the bluff?     A. Yes.

Q. So Joe Puna had cleared on this bluff all the way practically from the bottom of the bluff to the top? [125—100]     A. Yes.

Q. This rubbish pile was right up against the bluff, was it not?     A. Close to the bluff.

Q. Where it was close to the bluff, was there any growth or had it all been cleaned up?

A. By the pile of rubbish.

Q. What do you mean by this pile of rubbish?

A. By this pile of rubbish was where the grass and other weeds was growing.

Q. How about the sides at the end of the rubbish



(Testimony of Kahino.)

pile, had they been cleared?

A. That place was cleared.

Q. How about the other end of this rubbish pile, had that been cleared?     A. Yes.

Q. Who were down below beside yourself?

A. I and Koolau.

Q. And did you help to cut away some of the rubbish or growth that is, near the road on this bluff, beside putting the rubbish together in this pile?

A. I helped to gather up the rubbish lying on the road.

Q. Did you cut any brush itself near the road, either with a shovel or anything else?     A. No.

Q. Where was the fire on the pali when you first saw it? Was it at the top of the first bluff?

A. By the place Joe Puna was working, that is where it first started.

Q. How high up?     [126—101]

A. Same as the height of where Joe Puna was working.

Q. Where was it, in the leaves or grass, or where?

A. In the dry leaves. It started in the dry leaves, the fire did.

Q. How was your attention drawn to this fire, that is, on the pali?

A. We were standing on the side of the road after Koolau came back from the warehouse, we were standing there, and after the fire got burning intensely, we saw it had caught on top of the pali.

Q. Was the fire on the pali from a spark that flew up from the fire below?     A. Yes.

(Testimony of Kahino.)

Q. Did you see that spark fly up?

A. The spark didn't fly up there, it was the violence of the wind that took the flames up there.

Q. This wind, you say this wind went around in a ring? A. This whirling wind.

Q. Did you see the fire and smoke and rubbish whirling up across this way? A. No.

Q. What makes you think this wind was a whirling wind?

A. When this whirlwind struck the place, it picked up the leaves and brought them down to the fire.

The COURT.—Could you see anything whirling in the whirlwind?

A. I couldn't remember that time.

Q. You didn't see the wind itself, did you?

A. I saw the wind after the fire was lit. I saw the wind. [127—102]

Mr. HEEN.—You saw this wind came on top and brought down some of the rubbish?

A. Blew up the pali and down again.

Q. Mr. Kahino, you say this wind came along and hit the pali, went up under the lauhala trees and then blew the leaves around and back into the road, is that it?

A. The wind blew up the end of the pali, blew down and blew the flames up into the rubbish.

Q. Did it keep on going like that?

A. No. That was in the gulch and the winds in the gulch just go up, strike one gulch, go over and strike the other, and come back again.

(Testimony of Kahino.)

Q. While the fire was going on, that is, after it had caught on top of the pali, did the wind keep up its violence?     A. Kept up.

Q. How long had you been working in that vicinity before this occasion?     A. Not long.

Q. Was it a week or more?     A. No.

Q. Less than a week?     A. Not a full week.

Q. Before this occasion, had you seen around there this same kind of wind, this strong wind, unusual wind?     A. No.

Q. *Who* when you said in your direct examination that this strange wind, or this whirlwind, when you were asked to describe that, and you said it was the prevailing wind, you did not mean that it was the prevailing wind, did you? [128—103]

A. The prevailing wind is the trade wind.

Q. But this wind, this strange wind, that you saw, this unusual wind, that appeared there that morning, was not the trade wind, was it?

A. Yes, that is not the trade wind.

That is all. [129—104]

Redirect Examination.

Q. You have described this wind in your cross-examination here as a wind that struck the pali, went up the pali and down again, is that what you mean when you say it was a whirling wind?

A. Yes, it resembled a whirling wind.

Q. Did it resemble a whirling wind because it went up the pali and came down again?     A. Yes.

Q. I think you also said on your cross-examination that this was because there was a sort of a gulch

(Testimony of Kahino.)

there, also a pali on the side?

A. Yes, sometimes working in a gulch like that the prevailing wind of Kohala enters one gulch, strikes the pali on one side, goes over and strikes the other side, and comes back again.

Q. Is that what it did on this occasion?

A. I don't know what the wind did that morning.

Q. What I want to get at is this, have you seen the wind act in about the same way in other gulches in other places where the lay of the land is about the same as it was there in that road? A. Yes.

Q. State whether or not that is something that might be reasonably expected in places of that sort?

Objected to, and question is withdrawn.

Q. State whether or not it is to be expected in places similar to this, where this fire took place, where there are palis there, sort of a gulch, that the wind will act in the way you have described. [130—105]

Mr. HEEN.—I object to the question. It is not proper redirect examination, and should have been put by counsel in his case in chief, in the direct examination.

The COURT.—The objection, being as stated, it is overruled.

A. Not usual.

That is all. Recess taken for five minutes.

The COURT.—Who was the man who first started taking earth down from that bank on the occasion to which you have referred?



(Testimony of Kahino.)

A. There were some men, but not at this place working.

Q. At the place, on the bank near the place where the fire was started?

A. Not close to that place, nobody was working there.

Q. This bank, as to which you have been talking, was there no earth taken from that bank, cut away from that bank?

A. No. After the rubbish is cleared away, then the dirt is taken.

Q. Was there some dirt taken that day?

A. Yes.

Q. Who was the man that started in digging the dirt? A. Joe Puna.

Q. Did he begin to do that after the brush had been taken down from the bank?

A. After the fire and the rubbish had been cleared away. [131—106]

Q. That is, before the fire that spread so, there had been no earth taken from the bank, is that correct?

A. No.

Q. After the fire and before the next day, that is on the same day as the fire, was that bank cut down?

A. Yes, we worked there until the day was over.

Q. After the day's work, was the top of that bank higher from the road than it was before the day's work? A. Yes, it was higher.

Q. Between the pile of rubbish that was set on fire and the region under the lauhala trees, was there any space of rubbish that the fire did not consume?

(Testimony of Kahino.)

A. If it hadn't been cleaned off, the fire would have caught it.

Q. Was there a clear sweep of the fire, clear track made by the fire, from this rubbish right up the bank?    A. Yes.

Q. There were no spots unconsumed above this pile of rubbish?    A. No.

That is all. [132—107]

**[Testimony of Joe Puna, for Plaintiff.]**

Direct Examination of JOE PUNA.

Q. What is your name?    A. Joe Puna.

Q. Where do you live?    A. Halawa.

Q. Kohala?    A. Yes.

Q. On this island?    A. Yes.

Q. I will ask you if you remember a fire that took place on the Aamakao section of the Kohala highway, on October 18th, 1912?    A. Yes.

Q. What was your work or occupation at that time?    A. Working on the road.

Q. For the County of Hawaii?    A. Yes.

Q. Who was your luna?    A. Koolau.

Q. The road overseer was Naipo?    A. Yes.

Q. From whom did you get your pay, did you get it from the County of Hawaii?

A. From the County of Hawaii.

Q. About what time of the day was it that this fire started?    A. Little before seven.

Q. A little before or a little after seven, which was it?    A. After seven. [133—108]

Q. It was after you started work there on the road, wasn't it?    A. Yes.

(Testimony of Joe Puna.)

Q. Now then, I will ask you whether or not you knew that there was up above the pali, alongside this road a field of cane growing? A. Yes.

Q. Who started this fire? A. Koolau.

Q. He was working there on the road at the same time? A. Yes.

Q. What did he start the fire in, what was it he set fire to? A. Dry rubbish.

Q. What did this rubbish consist of?

A. Dry lauhala leaves, dry Hilo grass.

Q. Where did it come from? A. From the pali.

Q. How did it get down on the road? A. I did.

Q. You mean you pulled the stuff down?

A. Yes.

Q. Who told you to do that? A. Koolau.

Q. What for, why?

A. To clear the pali from rubbish, and then dig out the pali.

Q. Do I understand you, then, you were clearing this rubbish off the pali so that you could get at the pali and dig away dirt? A. Yes. [134—109]

Q. What were you going to do with the dirt?

A. Fill up the road.

Q. Who made the pile of rubbish, who brought it together into the pile? A. Kahino.

Q. Was he piling it up there as you were pulling it down from the pali? A. Yes.

Q. As you were pulling this rubbish off the side of the pali here so that you could get at it to pull off the earth, I want to know to what extent you cleared the pali of this dry grass or rubbish, approximately

(Testimony of Joe Puna.)

all of it, or just enough so that you could get at it and dig out the dirt?     A. I didn't clear all.

Q. What was left?     A. Patches of dry grass.

Q. Why did you leave that there?

A. It was not all cleared up.

Q. Do I understand it was because that it did not interfere with your digging the earth away?

Objected to, and question withdrawn.

Q. How did it happen that you didn't dig away all this dry grass, which you say was left there?

A. We just started in to work, and hadn't finished.

Q. Where was the rubbish pile, on which side of the road?     A. Left side.

Q. Next to the pali, or on the side away from the pali?     A. A little ways from the pali. [135—110]

Q. On which side of the road?     A. To the pali.

Q. Next to the pali?     A. Yes.

Q. About how large a pile was this?

A. Not very big.

Q. What was the condition of the grass and the weeds and vegetation growing on the pali and up above on the pali, was it green or dry, dry or damp?

A. Some was green, some was dry.

Q. Was there very much dry vegetation?

A. Yes.

Q. On the sides of the pali?

A. Yes, on the slope.

Q. There was this dry vegetation growing right on the side of the pali, right up from the road, was there?     A. On this side of the pali and the slope?

Q. Both?     A. Yes.



(Testimony of Joe Puna.)

Q. Was there any wind blowing that morning?

A. Yes, the prevailing wind, good wind.

Q. What do you mean by good wind?

A. Good wind, not a strong wind.

Q. Are you familiar with the prevailing winds in Kohala?     A. I am not acquainted.

Q. You live there, don't you, in Kohala?

A. Yes.

Q. Was this a trade wind, this morning?

Question withdrawn. [136—111]

Q. From which direction was that wind blowing, that morning?     A. From Hilo.

Q. You mean from the east, do you not?

A. Yes.

Q. Blowing toward the pali?     A. Yes.

Q. Did you see Koolau set fire to the rubbish?

A. I didn't see; I heard.

Q. You heard him set fire to the rubbish?

A. Yes.

Q. Where were you then?     A. On the pali.

Q. On the side of the rubbish pile, or in front of it, or right up immediately above it?

A. My face was towards the pali.

Q. Where was the rubbish pile?

A. Behind me.

Q. Down below you?     A. Yes.

Q. What were you doing there, on the side of the pali?

A. Clearing off rubbish, and then shoveling down dirt.

Q. Had you begun shoveling down any dirt then?

(Testimony of Joe Puna.)

A. I had commenced shoveling.

Q. Had you finished clearing off the rubbish?

A. Not all.

Q. When that rubbish pile was set on fire, had you finished clearing off the rubbish yet?

A. No. [137—112]

Q. You had not begun digging earth yet, if I understand you correctly? A. No.

Q. It was afterwards you began digging out the dirt, was it? A. Yes.

Q. How long did you stay there after the rubbish pile was set fire to?

A. About a quarter of an hour.

Q. What did you do then?

A. I was still clearing off the rubbish.

Q. Did you get down from the pali? A. No.

Q. Did you stay on the pali all the time the rubbish was burning? A. Yes.

Q. Did you see the fire start on the side of the pali, from the rubbish pile?

A. I didn't see, but Koolau told me the fire had started on the side of the pali, and told me to throw some dirt on it.

Q. Didn't you get down from the pali after the rubbish pile started burning? A. No.

Q. Did you keep on pulling down rubbish all the time this fire burned up the side of the pali?

A. No.

Q. What did you do, then?

A. When the fire had got started on the side of the pali, Koolau told me to shovel dirt on it, but I

(Testimony of Joe Puna.)

couldn't stay there on account of the heat, and I went above. [138—113]

Q. Did you feel the heat from the flames of the rubbish pile, there where it was burning?

A. Yes.

Q. When you felt that heat, what did you do?

A. I went above.

Q. State whether or not any grass around you caught fire on the pali side.      A. Yes.

Q. Where?

A. On my left side, standing facing towards the pali, the left side caught on fire.

Q. That is on the side toward the bridge?

A. Not on the side toward the bridge.

Q. You were standing there working on the pali how, facing toward the pali?      A. Yes.

Q. Now, stand up alongside of the wall, and I will ask you now on which side of you was it that the fire caught?      A. Left side.

Q. Left side?      A. Yes.

Q. On which side of you was the bridge?

A. There was the fire.

Q. On your left side?      A. Yes.

Q. When the fire started there in the grass, or the rubbish, on the side of the pali, did it spread rapidly or not?      A. Yes, went right up above.

Q. How high is that pali, the slope of that pali, where you were working from the ground? [139—114]      A. About nine feet.

Q. How far up on the pali side were you working?

A. About six feet.

(Testimony of Joe Puna.)

Q. Where was it that this fire caught in the rubbish, how far up on the pali side was it that the fire caught on the side of the pali?

A. About four feet.

Q. Do I understand you then, that it caught just about where the flames were burning from the rubbish? A. Yes.

Q. And then it went up the side of the pali?

A. Yes.

Q. What caused the flames to go from the rubbish pile to the pali side? A. The wind.

Q. Just explain how the wind did this.

A. A strong wind and a light wind would come.

Q. Was that the way it had been blowing that morning?

A. In the morning the wind was good, and after the fire was started it came stronger.

Q. You mean the wind kept on getting stronger right along?

Question withdrawn.

Q. State whether or not the wind which was blowing early in the morning, say about six o'clock, was the same as it was at seven, when you started work, at that same place, if you were there.

A. At six o'clock I was not there. [140—115]

Q. How much stronger was the wind at the time when the fire caught on the pali than it was when the fire was set to the rubbish pile?

A. I couldn't say.

Q. Was it just a little stronger, or much stronger?

A. Just a little bit.



(Testimony of Joe Puna.)

Q. Did you try to put the fire out after it caught on the side of the pali?     A. Yes.

Q. Did you succeed?

A. I tried to, but I couldn't put it out.

Q. Why not?

A. Too much dry rubbish there.

Q. And why did that make any difference?

A. The wind increased in violence and the fire was so strong we couldn't put it out.

Q. It spread too rapidly, you mean?

A. It didn't spread, but went straight up.

Q. And advanced too rapidly, is that it?

A. Yes.

Q. How far did it go?     A. Long ways.

Q. Through what?     A. Lauhala trees.

Q. Then what did it get to?

A. Got to the cane.

Q. Did it spread into the cane field?

A. Went into a section of the cane. [141—116]

Q. Did it burn it?     A. Yes.

Q. A large section, or small section?

A. Large section.

Q. How long was it then, from the time that the fire started, until the fire finally was put out, or was it extinguished?     A. Over an hour.

Q. Would that be somewhat over one hour then? Was it less than two hours?     A. Yes.

Q. Who else, if any body, tried to stop the fire when it started up the pali, and the slope above the pali, before it got to the cane, when it started up the pali?     A. All of us.

(Testimony of Joe Puna.)

Q. You mean Koolau and the other road workers working under him?     A. Yes.

Q. Right away?     A. Yes.

Q. Who were the first ones there trying to stop it around you?

A. Myself, Hanalukala, Poe and Kukui.

Q. Kahino?     A. Kahino was down below.

Q. Where were Hanalukala, Poe and Kukui working at the time, clearing rubbish off the pali side?

A. They were down below, makai.

Q. And when the fire started on the pali side and up the slope, they came up and tried to help you put it out, is that right?     A. Yes.

Q. And Koolau tried to help?

A. Yes. [142—117]

Q. Were there any other men working near the place where you were working beside those under Koolau?     A. Yes.

Q. Who were they?

A. People working at the bridge.

Q. Who was the luna there?     A. A white man.

Q. Wasn't Sniffen somewhere about?

A. He was clear over on the other side.

Q. Very far away?     A. Yes.

Q. Did Sniffen and his men come there and try to help in putting out the fire after it started?

A. Some of them came.

Q. How about the men at the bridge?

A. They didn't come.

Q. About how much space had you completed clearing off the side of the pali when the fire started

(Testimony of Joe Puna.)

on the pali? A. About two fathoms.

Q. That would be about ten or twelve feet?

A. The height.

Q. No, the width.

A. I don't know how many feet in width.

Q. How high did you clear up the pali?

A. About seven feet.

Q. Not clear up to the edge, then of the pali?

A. No.

Q. State whether or not the rubbish pile burned rapidly after Koolau set fire to it.

A. Not very rapidly. [143—118]

Q. How high did the flames come after it got well started? A. Four feet, perhaps.

Q. And you were standing up above, on the pali side? A. Yes.

Q. Had some of those flames bothered you any?

A. Yes.

Q. What did you do, then, when those flames bothered you that way? A. I went above.

Q. You went above to get away from the flames?

A. Yes.

That is all. [144—119]

Cross-examination of JOE PUNA.

Q. When you say you heard Koolau start the fire, you mean by that that someone told you he had started the fire? A. Kahino.

Q. You got to this place about seven in the morning, is that it? A. Before seven.

Q. And started work about seven? A. Yes.

Q. When you started working at that time, you

(Testimony of Joe Puna.)

started from below and worked up, is that correct?

A. In the middle of the pali is where I started.

Q. That is about six feet from the ground, is that correct? A. Yes.

Q. Your idea was to clear off some of the rubbish alongside of this pali then dig the dirt down, is that correct? A. Yes.

Q. The idea was to get the dirt for use on the road? A. Yes.

Q. And you were told, were you not, that the rubbish had to be cleared off first in order not to have it mixed with the dirt? A. Yes.

Q. When you started work there, was Koolau, Kahino and yourself at this particular spot?

A. Kahino and Koolau was below, I was above.

Q. At the same place, you were working up there, and they were below you? A. Yes.

Q. And you all were clearing off rubbish there?  
[145—120]

A. Me above, and them below.

Q. They were clearing rubbish, too?

A. Gathering it up.

Q. How about the rubbish below you, I mean the vegetation or growth below you, was there any there?

A. Some had been already cleared. Some had not.

Q. Who had cleared that that had already been cleared? A. Kahino.

Q. How did he clean it?

A. Cleaned it with a mattock.



(Testimony of Joe Puna.)

Q. With a pick ax?      A. Yes.

Q. Did he clear a space about twelve feet long along that pali?

A. Not exactly twelve feet, under twelve feet.

Q. Along this section which you and Kahino cleaned up on this pali, was there some grass growing, some Hilo grass?      A. Dry Hilo grass.

Q. Some of it green?      A. Yes.

Q. This pali, that section, was very rocky, wasn't it?      A. Not very rocky.

Q. Was there more dirt there than rock?

A. Yes.

Q. Was the whole section covered, or simply in spots, with this Hilo grass?

A. Some places growing, some places not.

Q. Some places were bare, is that it?

A. Other things growing there, but not Hilo grass.

Q. What else?      A. Ulei.

Q. Is that a fern?      [146—121]

A. Something that grows low, sort of a bush.

Q. Sort of a bush, is it?

A. Something that grows low to the ground, with white flowers.

Q. Some creeping plant?      A. Yes.

Q. Was it green or dry?      A. Green.

Q. Very much of it?      A. Not very much.

Q. Was there more grass than this green stuff?

A. Not much grass and not much ulei.

Q. In your direct examination, you said the pile was not very big, do you mean by that, because there

(Testimony of Joe Puna.)

was not very much grass, not very much rubbish, didn't make a big pile, is that it?

A. The pile was not big.

Q. That was because there was not very much grass there, not much of this creeping stuff on the pali?

Objected to as calling for a conclusion of the witness. Objection sustained, and exception noted.

Q. How big was this pile?

A. I don't know, I didn't gather it together

Q. You said it was not very big, give us your idea, approximately, not the exact size, but the approximate size.

A. I just think it was not very big from the ashes left there after it was burned.

Q. Did you see it before it was burned?

A. No.

Q. Did you see it while it was burning? [147—122]

A. Yes, when it was burning, I peeked over and seen it.

Q. At that time how big was it?

A. Just a small thing, I should say.

Q. About two or three feet long?

A. About four feet long.

Q. And about how high was the rubbish pile?

A. I don't know.

Q. Was it a wide pile at that time when you saw it? A. Not very wide.

Q. About as wide as the ditch in which it was?

A. No.

(Testimony of Joe Puna.)

Q. Was it in the ditch?      A. No.

Q. There is a ditch there, isn't there?

A. Right alongside the edge of the road there is a ditch, this was outside of that.

Q. Was the pile on the road, or off the road?

A. On the side of the road, outside of the ditch.

Q. So the ditch was between the rubbish pile and the road, is that it?      A. Yes.

Q. And the pile was right next to the lower part of the pali?      A. Not right close up.

Q. About how high were you from the pile when you saw it burning?      A. Six feet.

Q. Were you directly on top, or towards one end of the pile?      A. Right above.

Q. When the fire started on the pali, what was it burning at that time?

A. Dry grass and then caught fire on the Lauhala.  
[148—123]

Q. This dry grass was about how high from the road?      A. Four feet.

Q. You said before that you were six feet above the road, now was the dry grass which caught on fire below you?      A. Yes.

Q. Right near you?      A. Right below me.

Q. Was it a big patch of grass or a small patch?

A. Grass hanging down from the pali.

Q. Very much of it?

A. Grass not much but after it got above to the lauhala, yes.

Q. You were working there at the time it caught on to the grass in front of you, were you not?

(Testimony of Joe Puna.)

A. Above and to one side, Kahino was below.

Q. Above the place where the grass caught on fire, you had already cleared that space?

A. Not all of it.

Q. How much of it?

A. Only two fathoms, I said before.

Q. Two fathoms would be a distance of about from where you are sitting to where I am sitting?

A. No.

Q. What is your idea of two fathoms?

A. From myself to the edge of that table.

(Indicating about nine feet.)

Q. You had cleared this along the pali, that is in a line parallel with the road, is that correct?

A. Yes.

Q. How high up?

A. Above me not very high, but I was reaching above me, and clearing off there. [149—124]

Q. What kind of implement did you have?

A. Mattock.

Q. How high could you reach with that?

A. Not very high, reach up and haul down from that place where I was standing.

Q. About how long is that implement?

A. Not a very long handle.

Q. About two or three feet?

A. Perhaps, I don't know.

Q. Did you clean this space from the highest point you could reach with the mattock to the point where you were standing? A. Yes.

Q. You said on your direct examination, it was



(Testimony of Joe Puna.)

about seven feet, is that about correct, the space up and down you had cleaned?

A. No, I said from the road where I was standing was six feet, and from where I was standing on top, I don't know.

Q. Tell us how much space you had cleared up and down, you said about nine feet long, now how high was it?

A. Just a little above my head, just about my height, I cleared only that spot.

Q. About how tall are you?      A. About five feet.

Q. About how high above you?

A. (Witness indicates about one foot above head, or six feet.)

Q. When you saw the rubbish pile under you on fire, you were about six feet above it, that is correct?

A. Yes. [150—125]

Q. You kept on working, didn't you, after you saw the fire?

A. Yes, I kept working there until the fire caught on the pali.

Q. How long did you remain there from the time you saw the fire in the rubbish pile, up to the time the fire caught on the pali, about how long?

A. About a quarter of an hour.

Q. There was what you termed a good wind, at that time?

A. When the fire started, there was a good wind.

Q. By the term "good wind," you mean a light wind?      A. Yes.

Q. At the time the fire caught on the pali, you said

(Testimony of Joe Puna.)

before, it was four feet above the road where it caught on some loose grass, at that time was the wind violent?   A. Kind of strong at that time.

Q. How did you notice that the fire got on the loose grass, did you notice it from the heat, or was your attention called to it?

A. From the heat, and Koolau called to me.

Q. At that time you threw some dirt on it, didn't you?

A. Yes, Koolau told me to throw, to shovel dirt on, and I threw it on there.

Q. When you threw the dirt on this loose grass, burning grass, did the whole thing tumble down?

A. No.

Q. Then what did you do after you threw the dirt on that loose grass?

A. When I threw the dirt on the grass, the heat became intense, and I run above. [151—126]

Q. You ran straight up or sideways?

A. Sideways.

Q. When you got up you started in clearing some of the lauhala leaves, did you not?   A. Yes.

Q. How far from the edge of that first rise was it where you cleaned off some lauhala leaves?

A. Two feet.

Q. That is, the lauhala leaves were about two feet from the edge; that is, the dry leaves commenced two feet from the edge and ran in towards the lauhala trees?

A. Yes, two feet from the edge of the pali.

Q. What did you do with the lauhala leaves?

(Testimony of Joe Puna.)

A. I picked them off from the ground and got them out of the way.

Q. This was right above the pile burning on the road?     A. A little on the mauka side.

Q. But in the same direction, straight up?

A. Yes.

Q. How large a piece did you clear in that manner?

A. Not very big.

Q. About how much?     A. One fathom.

Q. And how far back did you go clearing the rubbish in that manner?

A. Not very long, the fire came up, and I couldn't clear it all.

Q. When the fire started up towards the pali, did Koolau try to put the fire out?

A. He tried to put it out down below, we were up above.

Q. What did he do when he tried to put the fire out down below?

A. He tried to put it out, to extinguish it. [152—127]

Q. How?     A. With his shovel, he hit it.

Q. When the fire was burning, that is before it started up strong, was Koolau removing grass from the side of the pali?     A. Yes.

Q. At the time the fire caught over the first pali, was the wind very strong, at that time?

A. Yes, quite strong.

Q. Did it get stronger?     A. Same strength.

Q. Did it keep the same strength right along?

A. After a little time, it was stronger.

(Testimony of Joe Puna.)

Q. Was it a peculiar wind?

A. I don't know what kind of a wind.

Q. How long had you been working at that place before that day?     A. That was the first day.

That is all.

Mr. OLSON.—I have other laborers who were working at the scene where the fire took place, present and ready to testify, but, as far as I can see at the present time there is no necessity for accumulating a lot of evidence *surround* the starting of this fire. They were not working as near the fire as the three men who have already testified. They are available to testify if the county attorney wishes to use them; furthermore, if the Court or Jury have anything further along this line [153—128] that they would like to have brought out.

The COURT.—I might say that there is one point that might be valuable to the Jury. It has come to my attention since the evidence came out that the photographs representing the bank are different. It lies entirely in your judgment to decide whether or not to put evidence before the Jury as to the difference in the appearance in that bank.

Mr. OLSON.—Yes, your Honor, I have the testimony of Mr. Southworth bearing on that. [154.. 129]

**[Testimony of John Sniffen, for Plaintiff.]**

Direct Examination of JOHN SNIFFEN.

Q. What is your name?     A. John Sniffen.

Q. Where do you live?     A. Niulii.

Q. How long have you resided there?



(Testimony of John Sniffen.)

A. About twenty years.

Q. Do you remember a fire which took place at a point on the Aamakao section of the North Kohala road, in the North Kohala District? A. Yes.

Q. Remember, I am speaking with reference to a fire which took place there on the 18th day of October, 1912? A. Yes.

Q. Were you in the neighborhood at the time the fire took place, were you near there? I don't mean right there, but close.

A. Yes. I was not right there, but close by.

Q. How near? A. Quarter of a mile.

Q. What were you doing?

A. I was a road luna.

Q. Under the County of Hawaii for that District?

A. Yes.

Q. You were working under the road supervisor, Mr. Naipo at that time, were you not?

A. Yes. [155—130]

Q. About what time of the day did that fire take place?

A. Between eight and nine, if I am not mistaken, I am not quite certain.

Q. Didn't it begin, as a matter of fact, between seven and eight, and wasn't it out and extinguished about nine, or somewhere thereabouts?

A. Perhaps so, I am not quite certain as to that.

Q. What time did you arrive at that part of the road where you were working that morning?

A. Seven o'clock.

Q. That place where you were working, which you

(Testimony of John Sniffen.)

say was about a quarter of a mile away from the place where the fire started, was that place mauka or makai of the place where the fire started?

A. On the side where I was working?

Q. In order to go to the place where you were working from the fire, would you have to go mauka or makai? A. Go around this side.

Q. You know where the new bridge, just built, was located? A. Yes.

Q. That was just a little way from the fire, was it not?

A. Where the bridge was being erected, you could see the place where the fire was; where the place where I was working, you could not, it was on the other side.

Q. You were on the other side of the bridge?

A. I was on the other side of the bridge.

Q. Were you working up to the time the fire started?

A. The place I was working, yes. [156—131]

Q. State whether or not there was any wind blowing that morning from the time you arrived there and started work, at about seven o'clock, up to the time the fire started?

A. Yes, there was a slight wind blowing, not strong.

Q. How did it compare with the ordinary trade winds that blow in Kohala as a rule?

A. That was the wind.

Q. Blowing from what direction?

A. From that side.

(Testimony of John Sniffen.)

Q. You mean the Hilo side?      A. Yes.

Q. That is, the wind was blowing from the east toward the west?      A. Yes.

Q. You are familiar with the place on the road where the fire started?

A. When I came there after the fire got started, I am acquainted with it.

Q. Did you see the rubbish pile near the pali, which had been burning?

A. I didn't see the pile of rubbish, it had all been burned up.

Q. Did you see the ashes that were left at the place where the fire had been burning?

A. Yes, I saw ashes lying there.

Q. Referring your mind now to that place, I will ask you, is it not true that the wind which was blowing from the east was blowing toward the pali at that point?

A. Yes, it came from this side and struck against the pali.

Q. Did the wind change at all as far as you could notice it from seven o'clock, when you first came there, up to the time when you first knew the fire had begun? [157—132]

A. After the fire started, the wind got kind of strong.

Q. How long after the fire was started?

A. I think about a quarter of an hour after the fire was started.

Q. You mean the time when you first found out that there was a fire?

(Testimony of John Sniffen.)

A. I didn't know the fire was going up above until I got there. When I got there, then I saw the fire had reached above.

Q. How was the wind blowing at that time?

A. A little bit strong at that time.

Q. How far had the fire gone up on the slope when you arrived there and saw there was a fire?

A. In the cane.

Q. It had already gotten into the cane?

A. Very close to the cane.

Q. How did you find out that there was such a fire?

A. One of my boys was taking rocks to the wagon, when he came back and told me that the fire had started.

Q. What did you do?

A. I took all my men and went over there with those men.

Q. What did you do when you got there with those men?

A. We tried to get the rubbish out of the way because the fire was going into the cane.

Q. Did you succeed?     A. We couldn't do it.

Q. Was this place where you were trying to get the rubbish out of the road near the warehouse alongside of the road?     A. Above the warehouse.

Q. I will ask you if Naipo, the road supervisor, had given you certain directions to give to Koolau, as to the work he was to do that morning? [158—133]

A. Yes.

Q. Did you give him those directions?

A. I showed him where to work.



(Testimony of John Sniffen.)

Q. What was that work to be?

A. Dig dirt from the side of the road, and to put it into carts and take it over to where they were filling the road.

Q. Did you notice the condition of the vegetation growing on the sides, along the side of the road, on the pali side, as to whether or not it was dry, green or what? A. Some dry, some green, that place.

Q. Was there very much dry material?

A. Lots of it.

That is all. [159—134]

Cross-examination of JOHN SNIFFEN.

Q. What was the green stuff growing there?

A. Hilo grass and ulei.

Q. Ulei, that is a creeping plant? A. Yes.

Q. Did that cover a considerable part of the ground? A. Not very much.

Q. You say you couldn't prevent the fire from getting into the cane? A. Couldn't prevent it.

Q. It was burning very rapidly, then?

A. The fire was burning quite hot, and the wind was blowing, and those men on the upper side couldn't stand the heat.

Q. The wind at that time was very strong?

A. Yes, quite strong at that time.

Q. Was it an unusually strong wind?

A. Not extra strong, but the wind would strike against the trees and sweep down underneath.

Q. Did the wind whirl around when it struck the trees, did it whirl down and around?

A. When the fire got up to the lauhala trees, that

(Testimony of John Sniffen.)

is *was* made it strong. The wind carried it along, and when the fire got up to the lauhala trees it burned fiercely up there, then the wind got this fire again and took it down again, which made it go more intense. The puahala trees were very dry when the fire caught in there, set everything on fire, then it flew around and set fire further. [160—135]

Q. When you first saw the fire, you saw it in the puahala trees, is that it, in the trees?

A. When we got there the fire was up in the puahala trees, spreading around.

Q. Were the leaves on the lauhala trees dry?

A. Some were dry.

Q. Was the fire there among the puahala trees at the time you arrived, or had it yet reached the puahala trees?

A. The fire was advancing in that direction when I got there.

Q. How far from the edge of the cliff, of the bluff, was this fire when you first saw it?

A. I am not quite certain, but I think about five fathoms from the edge of the pali, going towards the cane, over perhaps, or a little bit under perhaps.

That is all. [161—136]

[Endorsed]: Circuit Court, Third Circuit, Territory of Hawaii. Halawa Plantation Limited, Plaintiff, vs. County of Hawaii. Transcript of Evidence. Part 1. Circuit Court, Third Circuit. Filed April 23d, 1915, 10:50 o'clock A. M. E. M. Muller, Clerk. No. 846. Recd. and filed May 11, 1915, at 3:25 P. M. in the Supreme Court. J. A. Thompson, Clerk. [162—136½]

*In the Circuit Court of the Third Judicial Circuit,  
Territory of Hawaii.*

HALAWA PLANTATION, LIMITED,

VS.

COUNTY OF HAWAII.

**Index to Transcript of Evidence.**

**PART 2.**

Witness:	Direct Ex.	Cross-Ex.	Redirect Ex.
W. Alston	136-148	149-161	162-165
J. Atkins Wight	166-167		
P. W. P. Bluett	168-173	174	
Geo. C. Watt	175-185	186-187	
A. Von Arnswaldt	188-195	196-202	203-206
J. Atkins Wight	207-222	223-252	
Arthur Mason	253-268	269-275	
Charge to Jury	276-280	[163-137]	

**[Testimony of W. Alston, for Plaintiff.]**

Direct Examination of W. ALSTON.

Q. State your name, please.

A. William Alston.

Q. Where do you reside?

A. Union Mill, Kohala.

Q. How long have you resided in the County of Hawaii? A. Since February, 1911.

Q. What is your profession or occupation?  
engineer

A. Sugar ~~boiler~~ and chemist.

Q. Where did you receive your training as an engineer and chemist?

(Testimony of W. Alston.)

A. Audibon Sugar School and Louisiana State University.

Q. How many years did you spend there?

A. Three and one-half years.

Q. Did you complete your course there?

A. No, I did not.

Q. After you had studied there three and one-half years, what did you do?

A. Engaged in the Louisiana Factory.

Q. In what capacity?      A. Chemist.

Q. When was that?

A. During the 1910-1911 crop.

Q. Then where did you go?

A. I came to Hawaii.

Q. What part?      A. Kona.

Q. What was your occupation there?

A. I had no occupation; I was on a vacation.

[164—137½]

Q. Did you remain in Hawaii after that?

A. I did.

Q. Did you again resume your occupation?

A. I did.

Q. When?      A. The first of January, 1912.

Q. Where?      A. Halawa Plantation.

Q. The plantation conducted by the Halawa Plantation Company, Limited?      A. Yes.

Q. A corporation?      A. Yes.

Q. How long did you continue there?

A. Until July of this year.

Q. What was your occupation there?

A. Sugar boiler and chemist.



(Testimony of W. Alston.)

Q. Do you know a place in Kohala where a fire took place on the 18th day of October, 1912, adjoining the Aamakao section of North Kohala road or highway, which burned a field of cane belonging to the Halawa Plantation?     A. Yes, I do.

Q. Did you see the burned area; did you see the area swept by the fire?     A. Yes, I did.

Q. How soon after the fire?

A. The fire took place Friday morning; I saw it Sunday morning.

Q. The Sunday following? [165—138]

A. Yes, sir.

Q. Had you seen that field of cane before it was burned?     A. Yes, sir.

Q. When?

A. The last time I saw it before the fire was in September.

Q. During what part of the month?

A. About the middle of September.

Q. When you observed that field on the Sunday following the fire, I will ask you if you went over the place so that you were able to observe what part of the field had been burned, and what part had not?

A. Yes, from the makai end to the mauka end.

Q. Was any portion of the field unburned?

A. Yes, sir.

Q. Where was that section?     A. Makai end.

Q. How near the Government road?

A. The piece immediately adjoining the road.

Q. How extensive was that piece of unburned cane?

(Testimony of W. Alston.)

A. It extended along the Government road for, I couldn't say exactly how long, about 200 feet on the edge of the side road and about probably seventy-five to a hundred feet into the field itself from the road.

Q. There was a strip left there?      A. Yes.

Q. About how wide?

A. About two hundred feet or more than that.

Q. Along the road?

A. Along the Government road. All of that stretch next to the road was not burned and for a depth into the field of a hundred feet or more, perhaps more. [166—139]

Q. It was a strip adjoining the Government road on the mauka side?      A. Yes.

Q. What do you mean by two hundred feet on the edge of the side road?

A. Edge of the side road running into the plantation.

Q. Section road, you mean?

A. Yes, a road in through the field there.

Q. Can you state from your observation of that field of cane as you saw it in the middle of September, 1912, how the cane on the unburned section, which you later observed, after the fire, compared with the cane grown on the rest of the field which was afterwards burned?

A. The entire makai end of the field, next to the Government road, did not have as healthy a stand as the rest of the field, not as healthy—I should say as heavy.

Q. How do you account for that?

(Testimony of W. Alston.)

A. Near the Government road end, there is a line of ironwood trees, and the several rows of cane next to the road were not growing good, the stools not as thick, as heavy, as the portion of the field above the road away from the influence of the trees.

Q. Where did you go from Halawa Plantation, when you left there?

A. When I left Halawa, I went to Hoeo Mill.

Q. How long did you remain there?

A. I stayed there about two weeks. [167—140]

Q. Where were you employed, carrying on what occupation, if any at all, at the time the fire took place?

A. In the office of the Hawi Mill and Plantation.

Q. Also on the Island of Hawaii?

A. Yes, in the same district.

Q. Did you have anything to do with any cane which milled from the field which was burned in that fire?

A. Yes, I did.

Q. Just state what.

A. Some of the cane was ground at Union Mill, and I went to Union Mill to make an analysis of the cane received there from Halawa.

Q. You went from Hawi Mill to make an analysis of that cane?

A. Yes.

Q. Do you know how much of that cane was milled at Union Mill?

A. I do not know how many tons; I know how many loads.

Q. Do you know how many tons of sugar was manufactured?

A. No, I do not.

(Testimony of W. Alston.)

Q. Did you make an analysis of the cane which was milled at Union Mill?     A. Yes, sir.

Q. What were your results?

A. I couldn't say from memory, but I gave the results on the original notes of my analysis to Halawa.

Q. Have you that record?

A. No, I gave them to Halawa; I haven't them.

Q. I hand you three sheets of paper, memorandum sheets, and ask you if you can recognize or identify these sheets of paper from the writing contained thereon? [168—141]

A. Yes, sir, I recognize them.

Q. What are they?

A. They are the original notes I made of the analysis of three consignments of cane sent to Union Mill, and two of them have the weight of the cane, and the third one has the number of loads, but not the scale weight.

Q. Are those memoranda contained on those sheets of paper correct memoranda of your data obtained by you from your analysis?

A. Those are the original notes as I set them down from the observations made of the analysis.

Q. Are they correct?

A. They are correct to the best of my ability as a sugar chemist.

Q. I will ask you by refreshing your recollection from these memoranda to state what results you obtained from your analysis.

A. I have three analyses.



(Testimony of W. Alston.)

Q. Give us the full results.

A. From examination of the cane, I found on October 21st, there were seven cars weighing 63,070. I didn't weigh the cane myself.

Q. I want the results of your own investigation.

A. The brix in the juice from the cane was 19.4.

Q. What does that mean?

A. The brix is obtained from the hydrometer, which is an instrument showing the percentage of solids in the juice of sugar cane. The sucrose was 16.4.

Q. What does that mean? [169—142]

A. That means that the juice in the cane had 16.4% sucrose in it, sucrose being the chemical name for cane sugar.

Q. That being that in which sugar is obtained?

A. Sucrose is the chemical name for cane sugar.

Q. What further results?

A. I found that the purity was 85.5; by that is meant the ratio of the sucrose in the juice to the percentage of the total solids in the juice.

Q. Now has that anything to do with what is known as polarization?

A. I don't understand what you mean by the polarization?

Q. What you have just testified to, the percentage 85.5 being the ratio of sucrose to the solids in the juice?

A. No, that has nothing to do with polarization.

Q. What further results?

A. On the 22d, there were eight loads received,

(Testimony of W. Alston.)

which showed the following:

Brix	19.5
Sucrose	16.5.
Purity	84.6

On the 24th: 7 loads, as follows:

Brix	19.4
Sucrose	16.
Purity	82.4

Q. Go in.      A. That is the extent of my analysis.

Q. That is the full result of the chemical analysis made by you of the burned cane sent over to Union Mill from Halawa?      A. Yes, sir.

Q. I will ask you to state to the jury what was the condition of the cane growing on this field, afterwards burned, as you observed it in September, 1912?  
[170—143]

A. When I saw this cane, in September, 1912, I noted that the field had a growth on it better than anything I had seen on the plantation before, and, consequently, I was very much interested in the field, and made further journeys into the cane itself and around the entire field I examined it rather thoroughly, and noticed that the stalks of the cane were all of very good size and very good growth.

Q. Did you remain at Hawi Mill for any length of time?      A. No, sir; I was only there temporarily.

Q. Then where did you go?

A. Back to Halawa.

Q. When did you return to Halawa?

A. January 1st, 1913.

(Testimony of W. Alston.)

Q. I will ask you if you had anything to do with the cane which was harvested and milled from that portion of the field which was left unburned from this fire?     A. Yes, sir.

Q. State what you had to do with that.

A. At that time, I was chemist and engineer at the mill when that cane was ground, and I made analyses of the juice and the cane itself.

Q. Go on; state what you found. Have you got that data there?     A. It is all in the records.

Q. Is that the book (pointing to book).

A. No, that is the record only of bag sugar.

Q. Is this larger book the one?

A. Yes, that contains the analysis.

Mr. HEEN.—I would ask permission to ask the witness a few questions in regard to this point. [171—144]

Mr. OLSON.—Yes, go ahead, I have no objection.

Mr. HEEN.—You say this book is kept regularly by you?     A. Yes, sir.

Q. Since when?

A. Since 1912. Only records for 1912 and 1913 are in that book; the previous years were never kept.

Q. This is your handwriting?     A. Yes.

Q. You made the record immediately after you made this analysis?     A. Yes, sir.

Q. These are original entries?

A. Yes, sir. Of course, the original analysis are made on note paper. These are the original results.

Mr. HEEN.—I have no objection.

Mr. OLSON.—Mr. Alston, as you refer to the rec-

(Testimony of W. Alston.)

ord you have before you, I will ask you to state what the results of your examination and analysis were.

A. This cane was ground on the 23d and 24th of April.

Q. Was it ground separately or together with other cane from other fields?

A. Separately; no other cane was being ground on those two days.

Q. Go on; give us your results. I want to get the main characteristics of that cane.

A. We found the brix in the first milled juice on the 23d of April, being 19.24; sucrose, 17.13; purity, 89. The cane itself showed 14.62 sucrose and 13.75% fibre. [172—145]

On the 24th of April, the second day's grinding the cane, the first milled juice was:

20.15 Brix

18.29 Sucrose

91.2 Purity

the cane itself, was:

15.40 Sucrose

13.50 Fibre.

Q. Have you stated what the polarization was?

A. I don't understand what you mean.

Q. It is a term I understand to be used in connection with sugar, if you know of it as such, will you state what it is?

A. Polarization is merely the return we get from the polariscope, which is one point in the analysis of polarized sugar itself. That is another matter. We don't speak of polarization of cane.



(Testimony of W. Alston.)

Q. Did you estimate, or ascertain the polarization of the sugar itself that was manufactured?

A. Yes.

Q. You made the analysis?      A. Yes.

Q. State what it showed

A. On the first day we made some sugar, and also on the second day, and found the polarization to be 97.7 on the first day and 97.2 on the second day.

Q. Those were the results of your test?

A. Yes, sir.

Q. Did you make a similar test of the sugar manufactured from the burned cane, which you examined at Union Mill?      A. No, sir. [173—146]

Q. You didn't ascertain the polarization of that sugar?      A. No, sir.

Q. Will you state so that the jury will understand, in plain terms, how the juice from the cane from the unburned area you examined compared with the juice from the burned cane which you examined at Union Mill.

A. First, I will note the difference in what we call the brix in the cane, as just explained, the brix in the juice showed 19.24 and 20.15 on the two days on which this unburned area was harvested, and the burned cane showed 19.4 on two days and 19.5 on one of the days. We can see that the brix in the unburned cane was slightly higher than that from the burned area.

Q. What does that mean?

A. It shows nothing unless you have the other analysis. The sucrose of the burned cane shows on

(Testimony of W. Alston.)

one day 16.5, on another day 16.4 and another day 16. That is the percentage of sucrose in the juice on these three lots of cane ground at Union Mill. From the burned area the percentage of sucrose in the juice from this small area of unburned cane was on one day 17.13 and on the other 18.29, this shows about 2% more sugar in the juice. The difference in the brix is very small, being slightly in favor of the unburned area, so that there is a gain of slightly over 2% in the juice from the unburned area over that cane that was burned.

Q. Is there any thing else that the jury may learn?

A. We have also the purity of the cane on these three lots that were milled at Union Mill, as follows:  
[174—147]

85.5

84.6

82.4

The purities of the juice from this unburned area:

89. on one day, and

91.2 on the other day.

Q. Showing what?

A. Showing an increase in purity of about six in the unburned area that was harvested in 1913, over that harvested in 1912.

Court takes recess for five minutes.

Q. Will you now explain to the jury, or state to the jury, what the quality of this cane was as shown by the juice and from your analysis of the cane both, of the cane from this burned section and the cane

(Testimony of W. Alston.)

from the unburned section.

A. The quality of the cane from that burned section was good for that time of the year—was very good. The quality of the cane from the unburned section was excellent.

Q. How did that latter compare with the quality shown by the cane produced on the plantation in 1913? How did the quality compare with the general quality of the cane prevailing in 1913 on the plantation?

A. That was the best cane we harvested that year.

Q. Are you able to state from your analysis of the cane which was milled from the unburned section, how many tons of cane there were and how many tons of sugar were produced therefrom?

A. Yes, sir.

Q. Can that be done accurately as a scientific matter? A. Yes, sir. [175—148]

Q. Will you state how many tons of cane there were from this unburned section and how many tons of sugar were manufactured therefrom, from your calculations.

A. The tons of cane given in the second days' report?

Q. How many were there from your own calculations?

A. On the 23d of April, 1913, *there 138.4 tons.*

Q. That is tons of cane?

A. Yes. On the 24th there were 156.2 tons of cane. That is all that was harvested from the unburned area.

(Testimony of W. Alston.)

Q. Making a total of 294.6 tons of cane, is that correct?     A. Yes, sir.

Q. Now, will you please state how many tons of sugar were produced from this cane?

A. We produced from that cane 37.22 tons of sugar.

Mr. OLSON.—As I said before this is practically new matter to me, and there may be some things I have not covered, so I may desire to recall Mr. Alston later.

Mr. HEEN.—I have no objection. [176—149]

Cross-examination of W. ALSTON.

Q. You say that you ascertained from your calculations, from your analysis of the cane juice, the tonnage of the cane, in other words, what I want to find out, is how you got that?

A. By cane analysis and calculation and measurements of the juice.

Q. Did you compare that with the actual weighing of the cane, in order to show whether it was correct, did you go over the actual weighing of the cane? As I understand it, the cane is weighed in the field, or at the mill before it is milled.

A. Those comparisons are made at the time in order to check both the scale and the measurements.

Q. Do I understand that they weigh the cane on scales before milling it, is that the procedure in the manufacture of sugar?

A. Some places do, some places don't.

Q. At Halawa?



(Testimony of W. Alston.)

A. Some weighed, and some, I believe at that time was not weighed.

Q. How about this particular lot, was that weighed on the scales?

A. This cane was weighed on the scales.

Q. Have you a record of that? A. I have not.

Q. Did you compare the actual weighing on the scales with your calculation? A. I did.

Q. They were about the same, were they?

A. There was about three tons difference.

Q. Which was heavier, your calculation or the scale weight? [177—150]

A. The scale weights were heavier.

Q. Is that accountable to any thing such as trash, or any thing that might be on the cane? A. Yes.

Q. Now, I don't know very much about this brix proposition, does for instance, 10.4%, does that mean the percentage of organic matter, or solids in the juice?

A. If you will not say organic matter, it shows the percentage of solids.

Q. The total solids—the organic substance in the juice, as I understand it, the organic substance is a composition of sucrose and glucose, and the rest would be water?

A. I don't quite get your meaning. Organic matter doesn't mean sucrose and glucose less water. If you will give a fuller explanation—in the juice in the cane there are a number of substances. There is sucrose, which is cane sugar, and there is glucose, which is a sugar which does not crystallize out, and

(Testimony of W. Alston.)

several others known as reduced sugar. Then there are several salts and maybe sulphate salts and all of these affect the specific gravity or the density or the weight of the juice, the brix shows you the specific gravity, or density or weight.

Q. Would you say that the brix represents the density?

A. That depends on what you mean by density, it is sometimes referred to as density.

Q. If it is 19.4 brix, that means 19.4% solids?

A. In solution in the juice of the cane.

Q. The other percentages would be what?

A. The rest of it is water. [178—151]

Q. When you say 16.4% sucrose in the juice, that would be this, that is, deducting 16.4 from 19, would be the balance of other solids which cannot crystallize into sugar? A. Yes.

Q. I notice in some places you make a difference as to the percentage of sucrose in juice and in cane, for instance, on the 23d. On the 23d day of April you refer to your analysis of juice having 17.13 sucrose, now in your analysis of the cane from which that juice was extracted you have 14.62. How do you account for that difference?

A. The 17.13 is the percentage of sugar in the juice when the juice is taken away from the cane. Now this 14.62 is the percentage of sugar. You see, now, I have referred to 13.75 fibre for that day. If you will subtract that from 100 you will get the percentage of juice in the cane; if you will multiply that by the percentage of sucrose in the juice, you

(Testimony of W. Alston.)

will get the sucrose in the cane.

Q. That is the way to ascertain the sucrose in the cane, by first ascertaining the sucrose in the juice and by working backwards you get the percentage in the cane? A. Yes.

Mr. HEEN.—You are going to offer these records in evidence?

Mr. OLSON.—Not unless Mr. Heen wants them, I don't care to put them in.

Q. The difference in the percentage of your analysis of the burned cane and your analysis of the unburned cane you considered very slight, is that correct? A. No, sir. [179—152]

Q. The difference is great?

A. Yes, I mentioned before, I made the remark that the difference in the purity was about six points.

Q. I mean in the whole, as to the total analysis, such a big difference as to make a difference in the quantity of the output?

A. Yes, quite a difference.

Q. What is the purity of the cane that was milled from the burned area?

A. That cane was milled on three different days, and shows three different purities, they were:

85.5

84.6

82.4

Q. And on the other two days, when you milled the unburned cane, in 1912?

I will withdraw that for the present.

(Testimony of W. Alston.)

Q. By adding the first three days, the burned cane, and dividing the total by three you will get the average purity?

A. You would get the approximate average, you wouldn't get the true average, because the quantities were slightly different, but a slight difference in quantity. I shouldn't think it would be affected more than the second decimal. For those three loads, it would be a fair average because there were seven loads twice and eight loads once, and it so occurs here the eight loads was the intermediate figure there.

Q. 5.94, is that about the correct difference?

A. Did you carry two decimal places?

Q. Just about six?      A. About six.

Q. That is in purity?      A. Yes. [180—153]

Q. How would that affect the difference in tonnage or output?

A. The greater the purity, the greater the output would be.

Q. I mean the percentage difference in a given amount of cane?

A. Do you want me to say it would be that much more, or \* \* \*

Q. Say you have ten tons of cane of this amount of purity and another ten tons of cane with another amount of purity, the difference being six per cent, what would be the difference in the output of the two lots?

A. The difference in purity of six per cent would be greater. I couldn't say offhand, I would have



(Testimony of W. Alston.)

to have other figures than that.

Q. There would be a big difference?

A. Be about six per cent difference, slightly over six.

Mr. OLSON.—As I understand you Mr. Alston by that, taking a given number of tons, say 10 tons, of cane, which when analyzed, gives you the average result of 90.1 in purity, and taking another lot of 10 tons of cane, which when analyzed gives you an average percentage of purity amounting to 84.1, then, as between those two different batches of cane there will be an output from the cane of 6% more in one than in the other?

A. No, I would not make that statement, I must have other figures than the purity, but in this instance, I was presuming other conditions equal. The 90.1 would give greater yield, but it wouldn't give you 6% greater yield, I would say it would give less, unless given other figures to figure on.

Q. What other things would you figure on?

A. Purity of the final molasses and purity of sugar both. [181—154]

Mr. HEEN.—Would it be a fair proposition to ask you to take an average of your analysis of the first occasion and an average of the second occasion, and then ask you how much more sugar you would get out of 10 tons of the unburned cane than you would from the burned cane, the unburned cane being the second occasion?

A. That would be if both lots were done in the same factory under the same conditions.

(Testimony of W. Alston.)

Q. The factory would make a difference?

A. Yes, sir.

Q. That is the mill?

A. The mill and boiling-house results.

Q. Which was the better factory?

A. I am not familiar with the work Union Mill was doing at that time, I merely analyzed the juice from the cane.

Q. Assuming the factories to be the same, assuming the facilities of one exactly the same as the other?

A. Yes, that would be a fair question, but I would have to do some figuring.

Q. Would it take you long, can you give us an idea as to that?     A. No, not very long.

Court takes recess for 5 minutes.

Q. Can you give us the result of your calculations now, in answer to that question?

A. This is a formula accepted by sugar chemists, which is called the Noell Deerr Formula, which shows the amount of sugar that will be secured from a juice of certain analysis under certain boiling-house conditions. I have applied a formula to the cane—to the juice, as I said three days at Union [182—155] Mill—applied the same form over here to the cane from the unburned section, ground in April. The result shows that the cane at Union Mill, having a purity of 81.4 purity would yield, under the same conditions at Halawa, 81.4 of its sugar. Meaning by that, you would get 8.14 tons of sugar out of the juice, not out of the cane. This

(Testimony of W. Alston.)

formula shows we will secure 91.5% of the juice here. Meaning by that if, *if* had the juice come into the house with this condition with 10 tons of sugar in it, you would get 9.15 tons of sugar.

Q. That is ten tons of sugar with that purity would produce 9.15 tons and 10 tons of that purity would produce 8.14 tons? A. Yes.

Q. Will you try to explain this a little more to the jury. Try and express it so that the jury will be able to understand you.

A. Supposing you have 100 tons of juice over here under these conditions, and we have 100 tons of juice over here under these conditions, that is this juice here has a purity of 90.1 and this here 84.1; suppose we figure that juice has 15% sucrose in it, then there would be in both these, 15 tons of sugar coming into the boiling-house. In this instance it is possible for us to recover 84.1 of the sugar that comes into the boiling-house, and since we can recover 84.1 and we have 15 tons, we are going to get 12.615 tons from here. Over here, we find we can recover 91.5 tons of that sugar, and we recover 13.725 from the 15 tons of sugar.

Q. On account of this difference in purity in the two, you lose more in one case than you do in the other? A. Yes. [183—156]

Q. That is due to the fact that there is this difference in purity between the two?

A. Yes.

The COURT.—I would emphasize this feature to the attorneys, it is extremely difficult to make it

(Testimony of W. Alston.)

clear to the jury, we are satisfied that this is hard to understand, and it is quite desirable to get it in a clear way to the jury.

Mr. Sheriff, adjourn court until to-morrow morning at 10:00 o'clock.

Court adjourns.

(November 21st, 1914.)

Cross-examination of W. ALSTON Continued.

Q. Did you make, or did you calculate the number of tons of cane which was milled at Union Mill, that is the burned cane sent there to the mill, did you calculate that from your analysis? A. No, sir.

Q. Can you tell us from your own knowledge how many tons of sugar were produced from that bunch of cane brought there? A. No, sir.

Q. In the month of September, 1912, you were in the employment for the Halawa Plantation, were you not? A. Yes.

Q. How long had you been employed there up to that time? A. Since the first of January.

Q. Employed as sugar boiler and chemist?

A. Yes, sir.

Q. What were your duties as such?

A. My duties there were control of the boiling-house, and [184—157] supervision of the work of the mill in general.

Q. Did your duties include going around the cane fields? A. No, sir.

Q. When was it that you visited this particular field of cane, a portion of which was burned on the



(Testimony of W. Alston.)

18th day of October, 1912, before it was burned?

A. Some time about the middle of September.

Q. Did you visit any other fields in that neighborhood? A. Yes, sir.

Q. Were the conditions of the fields in that neighborhood similar to the conditions existing in connection with the field that was burned?

A. The field adjoining this cane was very young cane.

Q. Did you visit any fields nearby, not in the immediate vicinity, but somewhere near there in which the cane was about the same growth as the one which was burned? A. Yes, sir.

Q. How did that compare with the burned cane, about the same?

A. No, it was not as good in the other fields.

Q. You said that you went through this field very extensively; did you go around the outer boundaries of the land?

A. There are two section roads through the fields, and I went through one over towards the Niulii side, then around the edge of the gulch, around the field and back up through the center.

Q. You recognize the plan on the blackboard, there? A. Yes.

Q. Does that give an approximate idea of the field?

A. We will say that this road is more over this way than shown on the diagram. [185—158]

Q. Further in the middle? A. Yes.

Q. You went up that road? A. Down that road.

Q. There were some exposed portions in that field

(Testimony of W. Alston.)

were there not; that is, portions exposed to the winds?

A. Some portions of the field rose up rather high, kind of knolls where the wind swept them and portions along the edge of the road there was a row of so-called ironwood trees there, but not heavy enough to prevent the wind from sweeping that part of the field.

Q. That is where the unburned cane was?

A. Yes; this portion here was covered by a rather thick growth and was fairly well protected.

Q. Was the growth near the cane field, that is, along that part of the road?     A. Yes.

Q. On the easterly side of the land?     A. Yes.

Q. At the time you visited the field about the middle of September, was the cane that was growing on the easterly side of the land similar to the cane growing near the Government road; that is, the unburned portion?     A. The entire field was similar.

Q. Similar to the unburned portion, that portion not burned in the fire?     A. Same kind of cane.

Q. That is, I mean similar in growth?

A. That right near the road, for several rows, was much shorter. [186—159]

Q. About how many rows were shorter than the rest?

A. I couldn't say, probably for about fifty feet, the further away it got the better it got.

Q. I think you said yesterday, that that was due to the growth of the ironwood trees.

A. I think that was the cause.

(Testimony of W. Alston.)

Q. You are not certain?

A. Well, it is a well-known fact that cane growing near ironwood trees does not develop as well as cane grown in the open field.

Q. How about the cane near other trees on the easterly side of the land? Good back of a distance of fifty feet?

A. About the same distance, the trees are of the same growth as along there.

Q. Were there any other trees along here, up the mauka boundary of the land?

A. From here up I didn't make any observation. This road runs down into the gulch. From here along the trees are fairly close to the cane.

Q. Then I understand the cane, say for about fifty feet back from these trees along the easterly portion and along the Government road, were of about the same growth and same condition? A. Yes.

Q. Then you examined the cane below the east and west section road, and did not examine the cane above that section road? A. Yes.

Q. How about the west side of the field, was there any trees there? [187—160]

A. The west side of the field, as I remember, runs down into the gulch. I couldn't say positively whether there are any trees there or not.

Q. Did you examine the condition of the cane in section 1?

A. Yes. This road runs through the field and I came along the edge of the road. There the road begins to go down into the gulch; I examined some

(Testimony of W. Alston.)

places in about 100 or 150 feet along the edges of the road.

Q. How was the cane along the west boundary?

A. I didn't go along the west boundary.

Q. About what is the difference in the elevation between the mauka boundary and the makai boundary?     A. Not a marked difference; a little slope.

Q. About how far is the mauka boundary from the makai boundary?

A. I should say a quarter of a mile.

Q. You stated on your direct examination that when you went to this field after the fire, you noticed there was an unburned portion, and that there was 200 feet on each side of the Government road; that is, the length of the unburned portion along the Government road was 200 feet on each side of the section road, and the field ran in about 100 feet. That would make it then approximately 40,000 square feet, would it not?     A. If those figures are correct.

Q. That would be less than one acre?     A. Yes.

Q. And the unburned portion was 7.9 acres?

A. Yes. [188—161]

Q. So your figures are somewhat short?

A. That is merely my recollection. I have no way of measuring that portion.

Q. That is your best judgment, I presume?

A. Yes.

Q. It might have run into the field much more than 100 feet?     A. Yes.

That is all. [189—162]



(Testimony of W. Alston.)

Redirect Examination of W. ALSTON.

Q. Do you know when the sugar which was produced or milled from the unburned area was shipped for market?     A. Yes, sir.

Q. When was that?

A. Shipped from Mahukona on July 11th of 1913.

Q. One other point, Mr. Alston, when an area of cane has been burned, as this field was burned, I will ask you what effect that has on the cane, the juice in the cane; if it has any effect upon the cane if it is left standing, isn't harvested for any considerable period?

A. The general opinion among chemists and sugar boilers is that no immediate harm is done if the cane is harvested within from 48 to 60 hours after the fire; but if left longer than that it begins to deteriorate very rapidly.

Q. In what way?

A. Conversion of the sucrose, the sugar is changed.

Q. What about the souring of the juice?

A. It sours.

Q. What is the result from that on the quantity of sugar which the cane will yield?

A. It decreases the quantity of sugar you would get from the cane. The sugar deteriorates; it is no longer sugar, and cannot be recovered as such.

Q. You are familiar with the Halawa Mill, are you not, as it was in the fall of 1912?     A. Yes, sir.

Q. What about the capacity of that mill, tons of cane per hour and the length of time the mill should run in order to get the best results? [190—163]

(Testimony of W. Alston.)

A. Should not run over eleven hours, and ought not grind over thirteen tons of cane per hour.

Q. If the mill is crowded, if it is run longer than that, what is the result upon the quantity of sugar produced? A. You cannot get a full recovery.

Q. Meaning by that, that less sugar will actually be produced?

A. Less sugar will be produced than would be under normal conditions, under eleven hours grinding, and thirteen tons per hour.

Q. Do you know, or can you tell from your records, what the tonnage of sugar was that was produced from the Halawa plantation in 1912?

Up to the end of the grinding season, in the latter part of September, 1912, we produced 2,345 tons.

Recross-examination.

Q. How many tons did you say were produced in 1912?

A. Up to the end of September, when the regular grinding season stopped, 2,345.

Q. How are you able to fix that figure definitely?

A. That is my memory of the crop.

Q. Is that what is considered the 1912 crop?

A. Yes.

Q. What is the 1913 crop?

A. Including that which was harvested in October, 1912, it was 1,841 tons.

Q. Do you keep a record of that in the same record book you had yesterday?

A. In that small composition book. [191—164]

Q. Have you the 1912 crop?

(Testimony of W. Alston.)

A. The 1912 crop is here. This is a record of the number of bags of A sugar made and the number of bags of B sugar made, the other figures are shipments from the station at Mahukona to San Francisco. This represents local sale.

Q. Is this record in your own handwriting?

A. Yes.

Q. The first column shows the date, what does the rest show?

A. Shows the number of bags of A and B sugar of 125 lbs. each, requiring 16 bags to a ton. The total bags of sugar made altogether was 37,305, and local sales were 13,221 tons, the total bags shipped equaled 2331.5625 tons, and the local sales amounting to 13,221 tons, making a grand total of 2344.37835 tons.

Q. When you speak of the 1913 crop being 1,841 tons, including the cane that was milled in October—

A. Milled at Halawa Mill.

Q. That was 200 tons? A. Yes.

Q. This total, 2345 tons, does that include all of the cane, or only the cane planted by Halawa Plantation itself, or does it include some cane planted by outside planters?

A. The total output of the mill, plantation's own cane and cane grown by individual planters.

Q. Does your record show how many tons belonged to the plantation exclusively? A. No, sir.

Q. You say that cane burned in that fire which occurred on the 18th of October, deteriorates inside of 48 hours and 60 hours; that is, after that it begins to deteriorate; is that it? A. Yes, sir. [192—165].

(Testimony of W. Alston.)

Q. And the rate of deterioration depends on the weather conditions?     A. Yes.

Q. Being rapid if there is rain, if rain falls on the cane?

A. If the rain falls, deterioration increases.

Q. When did you visit the field after the fire?

A. On the Sunday immediately following. The fire occurred Friday morning, and I visited there Sunday morning.

Q. Was there any rain there at that time?

A. It was not raining at that time, but it had been raining; the roads were muddy.

Q. How long did you stay there?

A. I was there, I think about four hours.

Q. Did you visit that place again after that?

A. I think I returned again on the Monday or Tuesday. I don't remember exactly which day.

Q. Was it raining then?     A. I don't remember.

Q. It was a rather dry season, at that time, was it not, in Kohala?     A. Yes.

That is all. [193—166]

Mr. OLSON.—I will now put Mr. Bluett on the stand, but before doing so, I will ask to put Mr. Wight on the stand in order to prove the qualifications of Mr. Bluett, who made the survey.

**[Testimony of Mr. Wight.]**

Q. Mr. Wight, you have already been sworn, I will now ask you if you know Mr. Bluett?     A. I do.

Q. I will ask you if you and Mr. Bluett went over this field which was burned, not at the time it was burned, but at any time prior to this trial, did you



(Testimony of Mr. Wright.)

go over the field with Mr. Bluett?      A. I did.

Q. When?      A. On Saturday.

Q. Last Saturday?      A. Yes.

Q. That would be the 14th day of this current month?      A. That is the date.

Q. I will ask you what you did.

A. I took Mr. Bluett over the area so as to make him acquainted with the field so that he should be able to make a survey.

Q. Were you familiar with the boundaries of the field of cane which had been swept by the fire?

A. I was.

Q. I will ask you if you pointed out those boundaries correctly to him?      A. Yes.

Q. Including the unburned area?

A. Yes. [194—167]

Q. In regard to the unburned area, Mr. Wight, I will ask you, if you made any measurements of that, at any time?      A. I did.

Q. When?

A. After the cane was harvested in April, 1913.

Q. Now did you have anything to do with Mr. Bluett in regard to that portion?

A. I showed him approximately where these boundaries had been, but I couldn't show him exactly, because the whole field had been harvested.

Q. What else did you do?

A. I made some measurements, which I gave to Mr. Bluett.

Q. Were those measurements made accurately, to the best of your ability?

(Testimony of Mr. Wight.)

A. As I could make them.

Q. How did you make them?

A. With a tape-measure.

That is all. [195—168]

**[Testimony of P. W. P. Bluett.]**

Direct Examination of P. W. P. BLUETT.

Q. State your full name, please.

A. Peter William Perry Bluett.

Q. Where do you reside? A. North Kohala.

Q. How long have you resided on the Island of Hawaii?

A. Twelve years, with the exception of ten months in 1909.

Q. What is your profession or occupation?

A. Civil engineer and surveyor.

Q. How long have you been such?

A. Practiced for twelve years.

Q. Where did you receive your training as a civil engineer?

A. Royal Naval Engineering College, England.

Q. Did you complete that course? A. Yes.

Q. I will ask you if you have during the twelve years you have resided in Hawaii, done any surveying in Hawaii? A. Yes.

Q. A considerable amount or not?

A. Considerable amount.

Q. Do you know Mr. Wight? A. I do

Q. Do you know the Halawa Plantation, Limited?

A. I do.

Q. Situated in Kohala? A. Yes.

Q. Did you see Mr. Wight last Saturday, that

(Testimony of P. W. P. Bluett.)

would be the 14th of November, 1914? [196—169]

A. Yes.

Q. Where?

A. I met him in Kohala, and went with him into Halawa to a field in Halawa, one of the Halawa Plantation's fields.

Q. State what you did.

A. We went into the field up the section road, stopped there and Mr. Wight showed me the makai boundary and portion of the easterly boundary, and approximately the location of the portion of the cane I believe unburned by the fire. Then we proceeded to the upper end of the field, noting the western and upper eastern boundaries and southern boundary.

Q. This being the field Mr. Wight pointed out to you as the one swept by the fire in the latter part of 1912? A. Yes.

Q. Did you make a survey of the field pointed out to you by Mr. Wight? A. I did.

Q. Did you make a map of that field? A. I did.

Q. Will you produce that map if you have it with you here? A. I will.

Q. Had you been familiar with that field before?

A. I had done some work before.

Q. Work of what character?

A. I laid out the irrigation ditches in the field, I think it was in 1906, but am not very positive.

Q. Did you do any surveying then?

A. In connection with the ditches, not in connection with land measurements, [197—170]

Q. Is this the map you have made?

(Testimony of P. W. P. Bluett.)

A. That is the map.

Q. This is a correct map?

A. That is a correct copy, tracing, of the map I made.

Mr. OLSON.—I will offer this in evidence.

Mr. HEEN.—No objection.

The COURT.—It may be received and marked Plaintiff's Exhibit 10.

Q. Calling your attention to Plaintiff's Exhibit 10, being a tracing or map just admitted in evidence, I will ask you if that is a correct map of the field in question which was surveyed by you last Saturday?

A. It is.

Q. What, according to your calculation, is the correct area of the entire field, including the section roads running into the field?

A. Ninety-five acres.

Q. What is the correct area of the roads running through the field?     A. Nine-tenths of an acre.

Q. I will ask you, on this map at the makai end, adjoining the Government road, there is a portion which has the following wording, "area saved from fire, 7.89 acres"; I will ask you what that represents.

A. Mr. Wight pointed out to me the field and this certain section on which he said the cane had been saved. At the time I made the survey, there were no means of distinguishing that area from any other portion of the field, the marks had all disappeared. Mr. Wight told me he had taken [198—171] measurements himself and later forwarded me those measurements, and from the figures given me, I placed this



(Testimony of P. W. P. Bluett.)

portion on the map.

Q. What is the area of that portion just referred to, which represents the area saved from the fire?

A. Seven and eighty-nine one-hundredths acres.

Q. What is the correct area of the total portion of the field which was burned?

A. Eighty-six and twenty-one hundredths acres.

Q. Excluding the area used for the section roads?

A. Yes.

Q. And the unburned portion? A. Yes.

Q. On this map you have designated the following, total area of the field, area or roads, cane saved, cane burned, with the figures opposite, are those correctly set forth on the map in accordance with the figures given in your testimony? A. They are.

Q. Have you also indicated on the map the true meridians? A. No meridians.

Q. What is Hilo? A. Magnetic north.

Q. Being magnetic bearing? A. Yes.

Q. On this map you have also marked in words along the makai edge of this field and running up mauka on the easterly side thereof a strip as Government road; what does that represent? Is that the North Kohala Government road?

A. Yes, the main road. [199—172]

Q. You have also marked on the map as follows, "point at which fire entered the field from the gulch."

A. Mr. Wight pointed out to me, told me was the point where the fire entered the field.

Q. That is correctly set forth on the map according to the information given you by Mr. Wight?

(Testimony of P. W. P. Bluett.)

A. Yes.

Q. At the bottom of the map, which would be the mauka direction, you have the following wording, "scale 300 feet to an inch," will you explain what that means?

A. Every 300 feet of the field is represented by one inch on the drawing.

Q. What does that green line represent?

A. ———.

Q. At the other portion in the makai and easterly corner there is a small portion marked as follows, "kuleana planted in cane by Freitas," between the Government road and the green line boundaries of the burned section, which have a line of x's running through, indicating what?      A. A fence.

Q. Separating from the burned field another field, does it?

A. Yes, separating a piece of land under separate ownership.

Q. Running diagonally or directly through this map and through the field from the Government road makai in the mauka direction to the mauka boundary of the field, is a strip marked on the map as plantation road, what does that represent.

A. Represents a road running through the field used by the plantation for hauling and general work.  
[200—173]

Q. There is another road running from a point about midway, or about the middle of that plantation road, there is another strip running to the easterly boundary of the field, which is also marked, "planta-

(Testimony of P. W. P. Bluett.)

tion road," what does that represent?

A. That is a road running from the first mentioned road across the field, also a section road.

Q. I will ask you if the point marked as the point where the fire entered the field, from the gulch, when you made the survey last there was anything to designate that there had been a fire going up through the trees, the lauhala trees, etc.

A. I couldn't notice anything, it was very hard to distinguish anything.

Q. Calling your attention to the section on the map you have indicated as the part saved from the fire, so far as the area is concerned, would that, if that section were removed to the east or west, would that make any difference in the area?

A. It wouldn't affect the area at all.

Q. This portion marked as being planted in cane by Freitas, that piece is cultivated land?

A. Cultivated land.

Q. Running down to the Government road?

A. Yes.

Q. What is the width of each of those plantation roads running through the field?

A. They have a mean width of twelve feet.

That is all. [201—174]

Cross-examination.

Q. In making this survey, did you have with you the metes and bounds covering this piece of land as leased by the plantation from somebody else?

A. No, I had no description of the land at all.

Q. Was there any cane growing there at the time

(Testimony of P. W. P. Bluett.)

you made this survey?

A. Cane growing up in the southwestern portion, small area of cane, how much I didn't measure. The rest was clear. There was cane growing, but it was so short, just coming up. I said clear, but that is what I meant, just cultivated.

Q. Cane was growing right up to the edge of the road, that is the 12 foot section roads?

A. The land was cultivated in places; there was places where it was not.

Q. When you speak of the section roads being 12 feet in width, you mean by that the traveled portion?

A. Yes.

Q. How near to these roads would the cane be growing? A. Right up to the edge.

That is all. [202—175]

**[Testimony of Geo. C. Watt.]**

Direct Examination of GEO. C. WATT.

Q. What is your name, please?

A. Geo. C. Watt.

Q. Where do you reside?

A. Kohala Plantation, Kohala.

Q. How long have you lived on the Island of Hawaii?

A. Well, I have lived on the Island of Hawaii different times. I left for about six years, and came back in 1906, and lived here at Kohala Plantation eight years this past July.

Q. I will ask you what is your profession or occupation?

A. Manager of the Kohala Sugar Company.



(Testimony of Geo. C. Watt.)

Q. What is the Kohala Sugar Company?

A. The Kohala Sugar Company is a corporation in the agriculture business, growing cane and manufacturing sugar.

Q. Where?      A. In Kohala.

Q. Do you know the Halawa Plantation, Limited?

A. Yes.

Q. How near is that to the Kohala Sugar Company?

A. Their lands run right up to our boundary.

Q. Adjoining, in other words?

A. Yes, on the west side.

Q. How long have you been in the sugar business as an agriculturist?

A. A little over twenty-two years.

Q. Where?      A. In the Islands.

Q. In the Territory of Hawaii?

A. Yes. [203—176]

Q. How long have you been manager of the Kohala Sugar Company's plantation?      A. Eight years.

Q. During the six years previous to that time, what were you doing, and where were you carrying on your business?

A. I was employed by the Waialua Agricultural Company, Waialua, Oahu.

Q. Also a sugar plantation?      A. Yes.

Q. How long had you been there?

A. I went there in January, 1899, and came up to Kohala, in July, 1906.

Q. During the time you were employed on the plantation of the Waialua Agricultural Company,

(Testimony of Geo. C. Watt.)

what was your position or occupation there?

A. Head overseer.

Q. Being in charge of what?

A. Having in charge all the outside work of the plantation.

Q. Supervision of the planting and cultivation of cane? A. Yes.

Q. Prior to the time you became employed by the Waialua Agricultural Company, what had been your occupation?

A. I was for four years overseer for the Waiakea Mill Company's plantation.

Q. What kind of business was the Waiakea Mill engaged in, and where is it?

A. Growing cane and manufacture of sugar, at Waiakea, Hilo.

Q. This Island? A. Yes. [204—177]

Q. During the entire time you have lived in Hawaii, you have been occupied in the matter of growing cane? A. Yes.

Q. I will ask you, Mr. Watt, whether or not as manager and head overseer, as you have described your work in the past, you have had anything to do with the making of estimates of yields of sugar cane and sugar from sugar cane? A. Yes.

Q. During what period?

A. I should say that it began with my employment with the Waialua Agricultural Company, and afterwards coming to Kohala.

Q. I will ask you if you are familiar with, or know about a fire that took place on the 18th day of Octo-

(Testimony of Geo. C. Watt.)

ber, 1912, on a field of cane of the Halawa Plantation? A. Yes.

Q. When did you first learn of that fire?

A. It was on Friday morning. It was right after breakfast when the telephone rang and Mr. Wight told me that there was a big fire over there, and asked me if I could get over any men. It was very fortunate that day, I met the timekeeper on horseback, and I told him to get the men and go over to the fire, and I followed him over.

Q. How many men did you bring over from Kohala Plantation to Halawa to help in this fire?

A. I don't know the exact number, over 100.

Q. Bring anything else beside men?

A. Yes, cane knives to help put out the fire.

Q. Any wagons? [205—178]

A. Afterwards, when the fire was out, and they were harvesting the cane, we let them have everything we could to let them get the cane ground as quick as they could. We couldn't assist in the grinding of the cane, because the mill was dismantled, and the machinery being overhauled.

Q. What did you supply to assist them in the harvesting?

A. Laborers, animals, wagons, and they did have a traction engine, but it started in to rain, and they could not run it.

Q. When did it begin to rain?

A. Very shortly after; I couldn't say exactly, after two days or three days, it started very shortly after.

Q. How much rain?

(Testimony of Geo. C. Watt.)

A. Rained a good deal, I couldn't tell the amount, but it was quite wet, and the traction engine couldn't go over the field. I was over the field two or three times, and it was very muddy. Hauling the wagons was a hard job.

Q. When you brought your men over to the place where the fire was raging, I will ask you what was done there in connection with the fire?

A. I didn't get over there first. The head overseer and the timekeeper went over with the first bunch. When I got there I saw the men cutting a road in front of the cane ahead of the fire trying to save as much cane as possible by back firing. You have to sacrifice a little cane to get ahead of the fire or else the fire will sweep and take everything with it.

Q. What is the proper recognized method in sugar plantation work to stop or head off a fire started in a cane field?

A. It is a recognized fact that you can't do anything else than back fire. [206—179]

Q. Was this done at that time? A. Yes.

Q. And with what success?

A. The success was that the piece that was back fired was the only cane saved in that field.

Q. That consisted of what?

A. Strip along the Government road that was nearest the point where our men were, that is, where they started in.

Q. Calling your attention to Plaintiff's Exhibit 10, being a map introduced in evidence of a field, will you



(Testimony of Geo. C. Watt.)

indicate on that map that portion of the cane field which was saved?

A. This patch right along the Government road here, each side of this middle road.

Q. Referring now to a strip indicated as a plantation road and pointing to that portion which has the wording on it, "Area saved from fire."

A. Yes.

Q. Was there any other portion of the cane field referred to on that map that was saved from the fire?

A. No, that was the only patch I know of being saved, I was over all the field at the time, that is the only patch I know of being saved.

Q. What was the condition of the wind that morning, Mr. Watt?

A. The weather had been quite dry, and we had the prevailing trade winds, quite a brisk trade wind, but we have that any time.

Q. When did you first notice such trade wind blowing that morning? [207—180]

A. There was nothing to indicate it more than any other morning.

Q. When did you first observe there was a wind blowing that morning?

A. The thing that called my attention to it was the fire traveling right ahead of the wind.

Q. I mean before the cane fire started that morning, when you first got up that morning, did you observe the wind?

A. There was nothing to call my attention to it that morning any more than any other morning, al-

(Testimony of Geo. C. Watt.)

though *a* saw a little smoke over there just before the telephone rang.

Q. From what direction does the trade wind blow in that district?

A. It generally comes from the east.

Q. That would be from the Hilo side? A. Yes.

Q. How rapidly did that fire travel in that cane after you got over there, and observed that there was such a fire?

A. Everything being dry, that fire traveled quicker than any cane fire I have ever seen, the thing was simply ripe for destruction.

Q. Was there anything more that could have been done, according to your observation, to save that field?

A. I don't think so. I think it was a miracle that an acre was saved.

Q. Had you ever observed this field before the fire?

A. Yes, I was very well acquainted with it, I had been over it.

Q. Referring you to the time when the crop burned was planted, did you know the condition of the field at that time?

A. Yes. The field lay a little while fallow, and it was ploughed before planting. It was in very good condition. It had been ploughed twice.

Q. You say it had been ploughed twice? [208—181]

A. Yes.

Q. Do you know of anything else that was done to

(Testimony of Geo. C. Watt.)

the field to prepare it for planting?

A. I took a good deal of notice of this field, paid a good deal of attention to it because I had been over the place so often. I didn't think the previous crop—it was not very good, and I just wanted to see how it was doing, as it had been planted with a —— crop, a kind of a pea.

Q. What is that planted for?

A. Planted in for fertilizer.

Q. What else was done, if anything?

A. Put on lime.

Q. What is that for?

A. Corrects the acidities in the soils and otherwise keeps the land in good shape—plant food.

Q. Otherwise known as “setting the soil”?

A. Yes.

Q. Did you notice when the field was planted?

A. Yes, the field was planted in excellent condition, was planted in good season.

Q. How often did you observe that field after that up to the time of the fire?

A. What made me pay a good deal of attention was, this cane was growing very well, it was excellent I might say, seen it, went through it several times, and going along the Government road there, I always observed how it was doing. I have seen it at least once a month.

Q. How long before the fire had it been since you saw it the last time?

A. The evening before. We were doing some

(Testimony of Geo. C. Watt.)

work over there and I had to go over that evening.

[209—182]

Q. Are you able to state what the condition of that field of cane was just prior to burning, when you saw it?

A. It was in my opinion, in excellent condition.

Q. How did it compare with other fields of cane you had observed in that vicinity?

A. I think it compared very favorable with the best.

Q. I will ask you what, in your opinion, if that cane had gone to maturity and had been harvested at the proper time, how many tons of cane in your opinion it would have gone to the acre?

A. I think if that field had been grown to maturity and harvested in good season, it would have gone perhaps a little over fifty tons.

Q. How much sugar would it have produced to the acre?

A. I think there would be no question, but that it would go six tons I should say.

Q. Would it have gone less than five and a half tons? A. No, not less than five and a half.

Q. To be certain now, and to give a conservative estimate, would you say five and a half tons would be a conservative estimate?

A. I think so, I think it would be a very conservative estimate.

Q. From your observations of that field of cane just prior to the fire, when would have been a proper time to harvest that field?



(Testimony of Geo. C. Watt.)

A. April, May, June or July, 1913.

Q. Are you familiar with the conditions which prevailed in that district from the time the fire took place up to and through the months of April, May and June of 1913? A. Yes. [210—183]

Q. Having known the conditions prevailing, according to your knowledge, I will ask you when that crop would naturally have gone to maturity and been harvested?

A. In either one of those months I have stated.

Q. When a crop of cane has gone to maturity, that is, when it has tasseled, about how long after that is it the usual thing to harvest cane in order to get the most satisfactory results?

A. Some cane tassels more freely than others, I think is a rule about three months after the tasseling period is a good time to harvest.

Q. What was this cane? A. Yellow Caledonia.

Q. What were the weather conditions prevailing from the time the fire took place up to the end of May or the end of June, with reference to a crop such as this would have been if allowed to stand and been harvested in due time?

A. The weather was fair weather for Kohala. It was a little dry, but we often have a great deal dryer weather than that year.

Q. You have also spoken of a portion of the field, adjoining the Government road on the makai side, which was unburned, did you observe that unburned portion of cane? A. Yes.

Q. I will ask you how that cane compared with the

(Testimony of Geo. C. Watt.)

rest of the field that was burned?

A. That piece as comes over from the Hilo side and along the Government road, it is high ground there and where it drops down on the other side, goes into the gulch, the piece left was higher ground, and right along the road ironwood trees were planted, and cane never does well at all alongside [211—184] of ironwood trees, or any other trees, and there was quite a strip which was naturally inferior on that account.

Q. About how much was inferior?

A. I should say the whole strip for twenty feet there was hardly any cane, and inferior cane back of that.

Q. How far back?

A. Perhaps an average of 45 or 50 feet, but very inferior cane. After that you get into better cane.

Q. Assuming, Mr. Watt, and I will call your attention in connection with this question to exhibit 10, the map of the field, showing the unburned portion as well as the burned portion of the field, assuming that the actual sugar produced from the unburned portion of 7.89 acres was 4.72 tons of sugar to the acre, would that change your opinion at all, assuming that to be the fact, as to what the field in general would have produced, which you said would not be less than 5½ tons? A. No, not one bit.

Q. For the reason that this piece is higher land?

A. And the portion along the road which is in the area of the field, and along the trees there, it doesn't produce good cane, and you have got nearly all in

(Testimony of Geo. C. Watt.)

that small piece that was saved—had most of it in the piece that was saved.

Q. Mr. Watt, you speak of this strip or area along the Government road which was inferior in quality to the rest of the field, I will ask you where in that field there were such portions, affected by the growth of the ironwood trees? [212—185]

A. The ironwood trees are mostly planted along the road, and going back and forth, I see it more here than any other part of the field, and after the ironwoods grow up they take the nourishment from the soil, and cane doesn't do well.

Q. Where were there such ironwood trees?

A. Right along the Government road, each side of the road.

Q. Pointing to the makai portion of the field?

A. Yes.

Q. Was there any other portion of the field around the boundaries where you did see similar conditions prevailing?

A. I am not so well acquainted with the boundaries over around the gulch side of this field or any other boundaries, I am more acquainted with the Government road, and can speak with authority.

Q. From your observance of the place was there any other place around the field where you noticed similar conditions? A. No, I did not.

Q. At the time just before the fire when you observed the field I will ask you, calling your attention to that portion of the map marked planted in cane

(Testimony of Geo. C. Watt.)

by Freitas, I will ask you if you observed that portion?    A. Yes.

Q. What was growing there?    A. Cane.

That is all.    [213—186]

Cross-examination of GEO. C. WATT.

Q. Referring to Plaintiff's Exhibit 10, whereabouts did you notice the men back firing?

A. Right down here, right along this line, down here and finished down here.

Q. You say that there is a distance of about 20 feet from the makai boundary of the unburned area of hardly any cane on account of the ironwood trees?

A. Yes. I say there is a distance of twenty feet there of almost no cane, there was about twenty feet of inferior cane.

Q. Twenty feet of hardly any cane?    A. Yes.

Q. Practically no cane?    A. Yes.

Q. From the fence?    A. Yes.

Q. Then twenty feet beyond that the cane was inferior?    A. Yes.

Q. Back of that, of course, the cane was not affected?    A. Yes, these are conditions well known.

Q. I just want to get the facts. Back of the twenty feet of inferior cane, it was good cane, the same as the rest of the cane in the field?    A. Yes.

Q. Is there a difference in the altitude between the makai boundary of this piece of land and the mauka boundary?

A. The elevation, yes, there was quite an elevation, I wouldn't say how much. I should think about fifty feet or a little more perhaps.    [214—187]



(Testimony of Geo. C. Watt.)

Q. Difference in the elevation?

A. Yes, some parts of the field are higher than others, it is not level.

Q. Mr. Watt, would you get better results from cane at a lower elevation than cane at a higher elevation on account of the difference in the warmth?

A. Fifty feet wouldn't make much difference.

Q. When you learned about the fire, you were at your house?

A. I was just leaving, just finished breakfast.

Q. About what time was that?

A. Half past seven.

Q. Was the assistance rendered that morning gratuitous?

A. I have got no compensation for it personally. The men who went over and cut cane were afterwards paid.

Q. It was a matter of charity?

A. Just one neighbor helping another.

That is all. [215—188]

**[Testimony of Alexander Von Arnswaldt, for Plaintiff.]**

Direct Examination of ALEXANDER VON ARNSWALDT.

Q. State your name please.

A. Alexander Von Arnswaldt.

Q. Where do you reside? A. Kohala.

Q. How long have you resided there?

A. Ten years.

Q. That is on this Island? A. Yes.

Q. What is your profession or occupation?

(Testimony of Alexander von Arnswaldt.)

A. Sugar boiler.

Q. Anythings else, besides that?

A. Chemist.

Q. How long have you been such?

A. Sugar boiler for fifteen years and chemist for six.

Q. Where have you been carrying on your work as sugar boiler and chemist?

A. Lately in Kohala, the last ten years in Kohala, seven years at Kohala Sugar Company and one year at Niulii, and I believe I went there after I was at Hawi.

Q. I will ask you where you were on the 18th day of October, 1912, at the time when a fire occurred on a part of Halawa Plantation?

A. I was in Kohala Plantation.

Q. After that fire occurred, did you go to Halawa Plantation?      A. Yes.

Q. When?      A. On the 19th.

Q. Of October?      A. Yes. [216—189]

Q. For what purpose?

A. Taking off the burned cane, or boiling it.

Q. Did you see the burned field?      A. I did.

Q. Did you see the fire at all?      A. Yes, I did.

Q. That was on the 18th?      A. Yes.

Q. What were you doing there?

A. I helped to put the fire out.

Q. You have already stated that you went over on the 19th to take care of the boiling of the sugar. State just what you did in that connection.

A. We tried to take the cane off as quick as possi-

(Testimony of Alexander von Arnswaldt.)

ble, worked long hours, and ground and boiled the sugar.

Q. I will ask you whether or not all the burned cane was milled at the Halawa Mill?

A. I believe a small portion went to Union Mill and Niulii.

Q. Was there any portion of the burned cane that went to any other place? A. Not that I know of.

Q. How much sugar, can you state how much sugar was produced at the Halawa Mill from the burned cane? A. Exactly 200 tons.

Q. Was there any other sugar produced from the cane that was burned, other than this 200 tons and that milled at Union Mill and Niulii?

A. I don't think so.

Q. There was not? A. No. [217—190]

Q. How long did it take to grind and mill the burned cane which was milled at Halawa? Have you got a record of that, have you a record from which you can tell that?

A. Yes, I have a little record of that.

Q. Is it a correct record?

A. *This only* a memorandum I have here.

Q. Is it a memorandum you made? A. Yes.

Q. At the time? A. Yes.

Q. Is it correct? A. Yes.

Q. Refreshing your memory from that memorandum, will you state how long it took?

A. We started on the 19th and finished on the 30th.

Q. State how continuously the mill was run grinding that cane during that period?

(Testimony of Alexander von Arnswaldt.)

A. The mill was run all sorts of hours running up to 2 in the night time and I think there were two occasions where we ground up to 3 in the morning, that would mean 21 hours running, steady running.

Q. What is the usual and most efficient period during which the mill is kept running per day at Halawa? A. About 11 or 12 hours per day.

Q. Can you state, Mr. von Arnswaldt, how many tons of cane it took to produce a ton of sugar of that burned cane? Have some memorandum by which you can refresh your recollection as to that?

A. Yes.

Q. Is that memorandum correct?

A. Yes. [218—191]

Q. Will you give us that?

A. From the burned area at Halawa, it took 12.39 tons of cane to make one ton of sugar.

Q. That is correct? A. Yes.

Q. How many tons of cane were ground?

A. Two thousand, four hundred and seventy-nine tons of cane were ground.

Q. How many tons of cane per day, that is the average, have you got that?

A. I haven't got it here, but you can easily figure it.

Q. Merely a matter of dividing?

A. Total cane by the day's grinding.

Q. How many days were there consumed in grinding this cane?

A. From the 19th to the 30th—thirteen days, including Sunday. No, it is 12 days.



(Testimony of Alexander von Arnswaldt.)

Q. Have you the data showing the analysis you made of that sugar cane and juice? A. I have.

Q. Will you state what it was?

A. The first milled juice was:

Density	17.6
% of Sucrose	14.74
Purity	83.7

Q. Is that for the first day?

A. No the whole period.

Q. I want to know how the cane which was milled in the part, part of the period of grinding compared with that toward the end?

A. I have two samples of first milled juice on the 19th, which had:

Density of	18.8
Sucrose	16.45
Purity	86.9

[219—192]

Q. Go on.

A. The second sample we had on the 19th was:

16.18	Sucrose
85.2	Purity
19.	Brix.

Q. Now let us have the end of the period.

A. On the 29th the first milled juice was:

16.18	Brix
13.40	Sucrose
79.8	Purity.

Q. Did you have any other analysis toward the end?

(Testimony of Alexander von Arnswaldt.)

A. Yes, on the same day:

16.8 Brix

13.31 Sucrose

79.2 Purity.

Q. Have you any for the last day of grinding, the 30th?

A. No, I have not. I think we finished on the 30th in the night, if I remember right, in the morning.

Q. The night following the day of the 29th?

A. Yes.

Q. So that it would be 11 days grinding instead of 12? A. Yes.

Q. Comparing the results of your analyses at the beginning of the period with those at the end, so that the jury may understand, what difference did they show?

A. Indicates that the juice, the first milled juice on the 19th was pretty fair juice; and that the juice on the 29th was rotten.

Q. Due to what, would you say why there was this difference? A. Sour.

Q. That is, the juice in the cane became sour towards the end of the period?

A. Yes. [220—193]

Q. What was the condition of the weather throughout the 11 days of grinding? A. Wet.

Q. Raining? A. Yes, heavy.

Q. When did it begin to rain?

A. I believe it rained on Sunday, I believe it rained a little on Sunday, because I remember the

(Testimony of Alexander von Arnswaldt.)

traction engine from Kohala came over and got stuck.

Q. And after that?

A. Wet, it rained off and on.

Q. How long was it after you started grinding before you noticed that the cane, or juice was beginning to deteriorate or be poor in quality?

A. That is a pretty hard thing to tell, because there was some cane riper than the other, and being all mixed up you could hardly tell the date when it started to ferment.

Q. How long does it ordinarily take cane which has been burned to begin to get sour or ferment from the time the burning takes place?

A. I should think under ordinary conditions after the third day.

Q. It begins to get poor after the third day?

A. Yes.

Q. In the taking off of this burned cane and in the milling of it, I will ask you whether or not under the conditions prevailing there and the facilities you had at hand, the crop could have been harvested in a shorter period of time than it actually took? That is, could it have been milled and taken care of in less time than it actually took?

A. No. [221—194]

Q. Why not?

A. For the reason that mill capacity was brought up to over the limit, and the cane couldn't have been brought in any quicker, couldn't have got it there.

Q. Can you tell me what the total sugar extrac-

(Testimony of Alexander von Arnswaldt.)

tion was for the burned cane?

A. You mean tons of sugar manufactured?

Q. The percentage of extraction, the percentage of the total sugar.

A. You mean the total sugar which was actually in the cane?

Q. Yes, the percentage.

A. 11.79% sugar in the cane.

Q. And what was the total extraction from the sugar, the percentage. What percentage of the total sugar in the cane was actually extracted?

A. There was 200 tons.

Q. I mean the percentage, there being 11.79% sugar in the cane, how much of that was recovered, what percentage of sugar was recovered?

A. I haven't got that figure here at all, I figured mine out according to tons of sugar.

Q. Mr. von Arnswaldt, you have already testified regarding some of the cane being more matured than others, what was the general stage of maturity of that cane, throughout, was it ready for harvesting and milling? A. No.

Q. When would it have been ready in the ordinary course of events?

A. May or June, that is the months to harvest.

Q. That is when the crop would naturally have been harvested? A. Yes. [222—195]

Q. Having been at the fire when the fire was sweeping through the field, I will ask you if there was any thing else that might have been done to save the field, or some further portion of it, than



(Testimony of Alexander von Arnswaldt.)

was done? A. I don't think so.

Q. What had been the weather conditions prevailing prior to the date of the fire, as to whether it had been wet or dry? A. Very dry.

That is all. [223—196]

Cross-examination.

Q. What would you say would be a fair analysis of cane? You said before that your analysis of the 19th was pretty fair, what would be a fair analysis?

A. For instance you had cane that show 20 brix, density, and had a percentage of 18 sucrose, that would be fine.

Q. How much purity? A. That would be 90.

Q. What would be a good analysis?

A. Average, a good average analysis *would* a percentage of sucrose of 17.

Q. How much brix? A. About 19.

Q. Purity?

A. The purity would be 89.4 in that case.

Q. That is what you would call a good general average? A. Yes, a good general average.

Q. How long did you work at the Halawa Plantation? On that occasion, just during the time that the burned cane was milled? A. Yes.

Q. Have you ever analyzed sugar cane in that district of a similar kind as the burned cane that was milled, showing an analysis of less than 16.8 brix?

A. Yes, I have.

Q. What was the lowest?

A. I think the lowest I ever worked was 9. brix; 4.60 sucrose, and 51.7 purity. [224—197]

(Testimony of Alexander von Arnswaldt.)

Q. Was that cane, or something else?

A. They called it cane.

Q. That cane wasn't the same as this burned cane?     A. No.

Q. If your 16.8 was rotten, what will this be?

A. This was worse than rotten.

Q. In making your analysis of cane, you make two analyses do you, one of the juice itself and one of the cane?     A. Yes.

Q. What was your general average of the cane, you have given us the general average of the juice?

A. In making an analysis of the cane, you take the fibre, there being only fibre and solids in cane.

Q. Did you make an analysis of that showing the solids and fibre?     A. Yes.

Q. Did you make a general analysis along that line?     A. Yes.

Q. Will you let us have that?

A. I haven't got it here. It is 11.78 sugar and 12.34 fibre.

Q. That is then, the average for all the cane that was milled from the burned area?     A. Yes.

Q. I understood you to say, Mr. von Arnswaldt, that you were not employed regularly at the Halawa Mill at the time the fire occurred?     A. No.

Q. You were employed there only during the time the burned cane was being harvested and milled, is that correct?     A. Yes. [225—198]

Q. During that time you became familiar with the working capacity of the mill, its grinding capacity, boiling capacity, etc.?     A. I did.

(Testimony of Alexander von Arnswaldt.)

Q. What sort of mill was that at that time, how many roller mill?

A. It is a two 3-roller set and 1 2-roller set, that would be a 8-roller mill.

Q. Was it working in first-class condition at the time, so far as grinding operations were concerned?

A. It was overworked. We had to open the mill up so that we could get more cane through, get more quantity of cane through per hour than would have been under ordinary conditions.

Q. What do you mean by opening it up?

A. Open the mill up to get more space between the feed rollers, between the rollers.

Q. According to that you wouldn't get a very high percentage of juice extraction? A. No.

Q. Aside from the fact that you had to open up the rollers, was the mill itself, so far as grinding operations were concerned, running in good order?

A. The mill itself, yes, the mill itself was in good order.

Q. How about the boiling capacity of the mill at that time, was it in good order? A. Yes.

Q. Did it handle the juice extraction, all the juice extraction that you got from the rollers?

A. It did to a certain extent, good as possible. The boiling-house was overcrowded, there wasn't enough capacity to hold low grade sugar. [226—199]

Q. Was there any loss in the final output due to that overcrowded boiling system? A. Yes.

Q. What percentage loss?

(Testimony of Alexander von Arnswaldt.)

A. The total loss in the boiling system would be, was at that time 23.01%, that is just in the boiling-house, not in the mill, exclusive of grinding.

Q. That is, I take it a certain amount of juice was extracted and due to the fact that the boiling system was over-crowded, a certain percentage of the juice could not be turned into sugar, and that the amount of loss due to that cause was 23.01%, is that correct?

A. Yes.

Q. What was the loss of juice owing to the opening up of the rollers, what was the percentage of loss?

A. Loss in the grinding was 11.24.

Q. Out of the 200 tons of sugar produced, did you have only one grade of sugar or more than one?

A. Two grades.

Q. How many tons of No. 1?

A. We manufactured No. 1, 194.56 tons.

Q. And the difference between that and 200 would be No. 2? A. Yes.

Q. What is the normal loss in the percentage of juice extraction in 8-roller mills if the rollers are not opened, in any mill, is it possible to give a fair estimate as to that?

A. Depends on the plant entirely.

Q. So you don't know what the normal loss is as to that proposition in that Halawa Mill? [227—200]

A. I could only go by figures, reports from previous years, for instance, the year 1912.

Q. What figures have you there, your own figures,



(Testimony of Alexander von Arnswalddt.)

or figures of the office?

A. For 1912, I have figures from the office. I wasn't there, I didn't make up the figures.

Q. Under normal conditions there is some loss, is there? A. Yes.

Q. In analyzing cane juice, you first, I believe, ascertained the density, sometimes called brix, is that correct? A. Yes.

Q. Then you ascertain the amount of sucrose in the juice? A. Yes.

Q. And to obtain the purity, divide the sucrose by the density or brix?

A. Yes, and multiply by 100.

Q. Now, in boiling the juice, you obtain No. 1 sugar from the first time boiling the juice?

A. Yes.

Q. And No. 2 from the second time?

A. Not the juice, that is the molasses, the run-off from your first sugar.

Q. You boil that and get No. 2 sugar? A. Yes.

Q. Is there any molasses left? A. Yes.

Q. I will ask you to give us the quantity out of that burned cane, the total quantity of sugar left after you got the No. 2 sugar?

A. I don't know the quantity. [228—201]

Q. You made no record of that as to how many tons?

A. You mean the quantity left over after all the cane was boiled?

Q. Yes. A. I don't know.

Q. After you get the first sugar out, there is a cer-

(Testimony of Alexander von Arnswaldt.)

tain quantity left, of molasses, that was boiled over and out of that you got the number 2 sugar?

A. Yes.

Q. Did you make a record of whatever measure you used, whether tons, gallons, or what that was left out of the No. 1 sugar?

A. The whole house was full after we finished, all the tanks were full. When we started all the tanks were full, so we left the same as we started with.

Q. Except that there was less sucrose when you started to get out the number 2 sugar in the molasses?

A. There was no more No. 2 sugar on hand when we started than when we finished.

Q. After you got out the No. 2 sugar out of this lot of burned cane, were all the tanks full with molasses? A. Yes, they were all full.

Q. Could you tell how much sugar was left in the molasses after you got out the number 2 sugar?

A. No, I haven't made any tests.

Q. Is it not the usual thing in the manufacture of sugar at the end of grinding a certain lot of cane, there is always left, a certain lot of molasses carried over to the next grinding?

A. Yes, always molasses carried over to the next crop.

Q. What size tanks were these in which molasses is kept?

A. I believe they were maybe five feet long, four feet wide and a foot and a half deep, I think. [229—202]

(Testimony of Alexander von Arnswaldt.)

Q. How many of those tanks were there?

A. I don't know.

Q. Were they all the same size?

A. No, I don't think so.

Q. Were they full at the time you left the mill?

A. Yes, I believe they were all full, excepting three, I guess three or four.

Q. From your experience as a chemist and boiler of sugar, can you give us an estimate of how much sugar could have been obtained from that?

A. I guess you could have made about in the neighborhood of 30 or 35 tons more.

Q. Of sugar?      A. Yes.

Q. The other day I put this question to Mr. Alston: Would it be a fair proposition to ask an expert to give us his answer to this problem or proposition. Take 10 tons of cane with a purity of 84.1 and take another lot of cane, 10 tons, with a purity of 90.1, and with the sucrose and density being equal, could you tell how much sugar could be obtained from one lot and how much from the other? Is it possible to answer such a question?

Question objected to.

Question withdrawn.

Q. Taking 10 tons of cane, analyzed at 84.1 in purity and taking 10 tons of cane analyzed at 90.1 in purity, and with all other things being equal in the analyses of both lots, how many tons of sugar would you be able to produce in one lot and how many tons of sugar in the other lot? [230—203]

A. All other things being equal, you can't change the purity.

(Testimony of Alexander von Arnswaldt.)

Q. If all other points are equal then the purity will also be equal then, is that correct?     A. Yes.

That is all.

Redirect Examination.

Q. I will ask you what made it necessary to open up the mill in order to mill this burned cane, to open it up wider than you would under ordinary circumstances?     A. To grind more.

Q. What was the occasion for wanting to grind more, why was it necessary to grind more?

A. Because we had to take this cane off quick.

Q. For what reason?

A. Because it was burned.

Q. I understood you to say on your cross-examination, Mr. von Arnswaldt, that when you completed your work in connection with this burned cane, that the coolers contained a certain amount of molasses which would naturally be carried over to the next grinding season?     A. Yes.

Q. How did the quantity of the molasses so left in the coolers after you completed your work compare with the quantity of molasses in the coolers when you began?     A. Just about the same.

Q. You are speaking now of quantity or quality?

A. Of quantity.

Q. How about the quality as compared with that that was in the coolers when you began? [231—204]

A. The quality might have been a little better after the burned cane, because there was no No. 2 sugar.



(Testimony of Alexander von Arnswaldt.)

Q. Would there be any material difference?

A. Not very.

Q. In dealing with the last question asked you on your cross-examination, in which you were asked to state what would be the difference in the case put to you by counsel, of one quantity of cane where the priority was 84.1 and another case where the purity was 90.1, you say if all other conditions were equal, the purity would also be the same? A. Yes.

Q. And to account for this difference in the purity, what other conditions would have to exist to make that difference?

A. The sucrose has to be either higher or lower or the density higher or lower to get another purity.

Q. So that when you say if the conditions are the same, resulting in the same purity, that would mean all the conditions, the amount of brix and the amount of sucrose? A. Yes.

That is all.

#### Recross-examination.

Q. In dealing with the question of the loss in the recovery of sugar from the milling of this burned cane, I understood you to testify that on account of the boiling-house being overcrowded, there would be a certain loss? A. Yes.

Q. And that in one instance the loss due to the boiling side was 23.01%? A. Yes. [232—205]

Q. And that the loss in the grinding was 11.24%?

A. Yes.

Q. Now, you have said that the loss that was occasioned in the milling, being due to the opening up of

(Testimony of Alexander von Arnswaldt.)

the mill on account of the greater quantity of cane, now, why was there this loss in the boiling operations?

A. Because we wasn't able to boil No. 2 sugar and because the juice was not as good as ordinary, the purity was low.

Q. In other words, the boiling-house was overcrowded? A. Yes.

Recross-examination.

Q. You say you didn't boil No. 2 sugar, you gave that as one reason, you couldn't boil No. 2 sugar because there was no place for it?

A. I mean not being able to boil it on grade, I had to boil it on proof.

Q. Then the fact that you couldn't boil No. 2 sugar was not due to the overcrowding of the boiling system?

A. No, it was due to the quality of the juice.

Q. And the fact that the boiling-house was overcrowded was one cause and the fact that you couldn't boil No. 2 sugar was another cause? A. Yes.

Q. With the same amount of cane and the same kind of cane run through the mill when the rollers were *closes* and the same amount run through with the rollers open, would there be any difference in the juice of the cane?

A. Yes, there is. [233—206]

Q. What difference would there be, would the juice be better or inferior if the rollers are in their normal condition, would the juice be better or inferior than that when the rollers are opened?

A. When the rollers are open it would be better juice.

That is all. [234—207]

**[Testimony of J. Atkins Wight, for Plaintiff  
(Recalled)]**

Direct Examination by J. ATKINS WIGHT.

Q. How long had you been manager of Halawa Plantation at the time of this fire?

A. About five years.

Q. I will ask you if you are familiar with this particular field of cane which was swept by this fire prior to its being planted, immediately prior to its being planted? A. I was.

Q. How long before that time had it been since the last crop had been taken off of that field?

A. About a year.

Q. What was done with that field during that period?

A. It was allowed to lie fallow for some time, and on the higher elevations stable manure was applied, and mud from the mud presses.

Q. What was done to this field, to prepare it for the planting of the crop of cane that was burned?

A. After being allowed to lie fallow for the neighborhood of about eight months, it was first ploughed. Then it was limed, and after a space of about six weeks, it was given a second ploughing, a large 6-wheel plough went over it first, followed by a 10-inch plough in the same furrow, giving it a greater depth.

Q. Was anything else done?

A. Green soiled.

(Testimony of J. Atkins Wight.)

Q. That is the growing, is it not, of these lagoons?

A. Yes, lichens.

Q. What was done with that? [235—208]

A. After they had grown to a considerable heighth, anywhere from 20 to 24 inches, prior to this the land was ploughed, and then sown, and after they got up to 20 or 24 inches, they were ploughed up with mule ploughs.

Q. What influence has this upon the land?

A. Considerable.

Q. What is that?

A. Gives the land a rest, and when you start to plough it, the stock roam on it and naturally left quite a lot of dumpings, there is quite an amount of grass and vegetation generally and this being ploughed and turned over increases the fertility of that soil.

Q. What does this green soiling do for the land?

A. It acts as a manure and also draws nitrogen from the air into the soil, which is a great benefit to cane, one of the principal elements in cane culture.

Q. This field was planted in 1911, was it not?

A. Yes.

Q. About what time?

A. During the latter part of July and finished, if my memory is correct, about the first or second week in August.

Q. When you testified before, didn't you say it was planted in May, June or July?

A. No, I said June, July and August.

Q. Whatever testimony you may have given be-



(Testimony of J. Atkins Wight.)

fore, this which you now give is correct, is it not?

A. This is correct. [236—209]

Q. When would this crop have reached its maturity if it had not been burned?

A. That is a rather hard question to answer for this reason, Caledonia cane is not a cane known to tassel freely. In certain years it will tassel quite freely and other years it will not, and when you speak of cane coming to maturity, as a rule is meant it has tasseled, so that Caledonia cane, in a way, you couldn't say it *every* reaches under ordinary conditions, true maturity.

Q. When would this crop have been in the best condition to harvest, so far as producing the best yield?

A. In my estimation during the months of April, May and June.

Q. How long have you been in the sugar planting business, yourself? A. Twenty-four years.

Q. When you said that it would have come to the best stage for harvesting, so as to produce the best yield, in April, May or June, of what year did you mean? A. 1913.

Q. How would you say the condition of the cane was at the time of the fire as compared with the condition it would have reached later in the months of April, May and June for the purpose of harvesting?

A. There was no comparison because the cane had not reached its full growth, and it was what we would call immature.

Q. When did you first learn of the fire?

(Testimony of J. Atkins Wight.)

A. On the morning of the 18th of October, Friday, about between 10 minutes to 8 and 8, as near as I can make out.

Q. What did you do, how did you learn of the fire?  
[237—210]

A. I just sat down to breakfast when I heard the bell ring, and I rushed out on the veranda and over to the office, which was less than 200 feet from the house, and I looked out to see what was the matter, as a rule, when the bell rings, it indicates that there is a fire. I saw nothing, and I called out to the man ringing the bell. He said there was a fire and pointed towards Niulii, towards this Aamakao section; I looked over there and saw the smoke. I jumped on my horse and ran as quickly as possible to the fire. I had the luna at the house at the same time, and I told him to get all the men on the plantation and bring them to the fire.

Q. Were they there?      A. Yes, all the labor.

Q. Was any other assistance brought to the fire?

A. Yes, the Kohala Sugar Company sent over about 110 men, and Niulii somewhere about 30.

Q. Any others?

A. And all the plantation men.

Q. What did you do when you arrived at the fire?

A. When I got there, right at the junction of these two section roads, in the middle of the field, the fire was sweeping through this lower section, No. 2.

Q. Referring to this map in evidence, Plaintiff's Exhibit 10, these roads where you say you came to at the intersection of the two, just point that out to the jury.

(Testimony of J. Atkins Wight.)

(Witness indicates point on map.)

Q. You are now pointing to the place where the section road in the middle of the field which runs from east to west, joins with the plantation road running mauka and makai? [238—211]

A. Yes. I jumped off of my horse and said to the men, you go along this road, the makai side, and back-fire, the road running east and west. I started at this corner of the road going mauka and makai and back-fired for a short distance and had to stop on account of the smoke, which prevented me from going any further. When I came back to this section road, away from the smoke, I listened and I heard the fire cracking a little distance in from this road.

Q. This is on the west side of the plantation road, running mauka and makai?

A. Yes. There is a little hollow there, and the fire had jumped down into that. When I found the fire had jumped into that section, by that time there was quite a big gang of men, who had been working close, at the mill and the stable and the teamsters, quite a big gang.

Q. In numbering on the map, the westerly portion, that part on the westerly side of the road running makai and mauka as 1, and the makai portion, that portion lying makai of the section road running east and west and on the easterly side as 2, and the remaining portion just mauka of the section road running east and west as No. 3, —

A. The fire had got into what is here, section 1.

(Testimony of J. Atkins Wight.)

I started the men from above this point cutting a roadway.

Q. Pointing a short distance mauka of the intersection of the two plantation roads?

A. Yes, on the west side of the section road. And cut a roadway right through this to the edge of the gulch, taking an angle of about this direction, trying to keep ahead of it, westerly and slightly mauka, roadway cut in; I suppose not less than 10 feet in width, running right through the field. [239—212]

Q. For what purpose?

A. Trying to head the fire off, to save this section above. Before the men had got it cut, the fire had already jumped this road, myself being behind clearing up the rubbish and trash. I was there so long, two men came looking for me, thinking I had got between the fires. I saw the fire jump right across this section, this piece. When I came out, I found that the fire had jumped also into this section 3. I don't know how far these men went, but I saw them start to back-fire, but how far they back-fired, I couldn't say, but it had jumped the section road and had swept into this piece over here. When the fire was out on the mauka side—previous to that I couldn't get on the mauka side owing to the fire. The fire had burned all this mauka piece in here, section 2. I was about to come down below. When I got there, the men had already cut a piece running from the road on this side, westerly side, straight to the gulch through the section straight westerly along the mauka piece that was saved. The fire jumped that



(Testimony of J. Atkins Wight.)

and came back in here further makai, then that got another lead from somewhere in here, then that caught the roadway straight to the Government road.

Q. How much of the entire field represented by this map, exhibit 10, was burned by this fire?

A. All this section 2, with the exception of this little piece, all of number *of* three, and all of number 1, with the exception of this little piece.

Q. Those two little pieces observed as the exceptions you have pointed to as being that portion of the map marked, area saved from fire, 7.89 acres, is that correct? A. Yes. [240—213]

Q. I will ask you if you have ever had any experience with burning cane before? A. I have.

Q. In your work as a plantation manager?

A. Yes.

Q. I will ask you if, in your opinion, anything could have been done to save that field that was not done with the equipment at hand?

A. Nothing more could have been done. Everything possible was done.

Q. Could you have gotten additional assistance, more than you did have? A. We could not.

Q. Did you observe whether or not any wind was blowing that morning?

A. In the early part of the morning there was just the usual wind blowing, so far as I remember.

Q. What do you mean by the usual wind?

A. Pretty stiff breeze from the east.

Q. Is that the trade wind?

A. Commonly called, I believe, the trade wind.

(Testimony of J. Atkins Wight.)

Q. How was it blowing at the time you arrived at the fire? A. Blowing a good, stiff wind.

Q. In what direction? A. From the east.

Q. About what time was it when the fire was finally put out? A. About half-past nine.

Q. Was there any other cane growing in the immediate vicinity of this field, or adjoining this field, which was as far along in its growth as this field?

A. Yes, a small section. [241—214]

Q. Where?

A. On the east boundary, there was a small section on the east side.

Q. Of the field? A. Field No. 2.

Q. Right between that field and the Government road? A. Yes.

Q. What cane field was that? A. Kuleana.

Q. That was marked on the map, exhibit 10, "Kuleana planted in cane by Freitas"? A. Yes.

Q. Down in the makai and easterly corner of the field, as shown on the map? A. Yes.

Q. Are there any trees growing between that kuleana and the field, proper? A. No.

Q. How is it marked off? A. Fence line.

Q. Are there any trees growing about those premises at all? A. Yes.

Q. Where?

A. On the makai, running along the Government road, and on a portion of the easterly boundary.

Q. Where, with reference to this Freitas kuleana?

A. Immediately above.

Q. How far do they extend?

(Testimony of J. Atkins Wight.)

A. Up to the top of the burned cane area and further on.

Q. You mean clear up to the mauka boundary?  
[242—215]

A. Yes, on the east side.

Q. What kind of trees are they as compared with the trees along the makai boundary?

A. Same species.

Q. What was the condition of the cane in this field, just prior to the burning of it, when the fire took place?

A. I consider it the best field of cane ever grown on the plantation.

Q. As a plantation manager, I will ask you whether you have ever had any experience in making estimates of what can fields will produce in cane and sugar?     A. I have.

Q. For what period of time?

A. For about 12 years.

Q. Are you familiar with the conditions of weather and otherwise that might affect the crop of cane, which existed at the time the fire took place and the time when you say the field would have been in the best condition to harvest?     A. I was.

Q. Bearing that in mind, I will ask you what, in your opinion, that field of cane would have produced if it had not been burned and had been permitted to remain on the ground until the proper time for harvesting?

A. I think it would have yielded six tons of sugar to the acre.

(Testimony of J. Atkins Wight.)

Q. In order to be on the safe side so that there will be no possibility for exaggeration, what would you say would be the lowest, conservative estimate of the yield that field would produce in sugar?

A. I don't think it would have gone less than  $5\frac{1}{2}$ , between  $5\frac{1}{2}$  and 6 tons. [243—216]

Q. I will call your attention to the fact that appears in the testimony that the sugar produced from the area left unburned was 4.72 tons to the acre, bearing that fact in mind, would that change your opinion as to what the whole field would have produced had it been allowed to stand until the proper time for harvesting? A. No.

Q. Why not?

A. I consider the section that was left unburned was of an inferior stand to the burned field. It was right alongside the Government road where ironwood trees are growing, and cane never does well alongside of ironwood trees, and for quite a few feet in it was really inferior cane owing to the trees, and then the field in that portion was wind swept to a certain extent, owing to the fact that there is more or less of a slope in this part here which is wind swept.

Q. To what extent would you say there was such inferior cane, where was that?

A. Along the Government road.

Q. On what side?

A. Mauka side of the Government road. On the makai side of the field, running the full length of the unburned section.



(Testimony of J. Atkins Wight.)

Q. What about the section beyond the unburned section, over to the easterly boundary?

A. Same condition as far as the trees are concerned.

Q. Is there any difference in the lay of the land from the unburned section over to the westerly boundary of the entire field?

A. Kind of a swail. [244—217]

Q. What about the cane growing there as compared with the unburned area just prior to the fire?

A. Much better condition.

Q. You have testified that on the easterly boundary of the premises from the Freitas kileana and running mauka, there were trees? A. Yes.

Q. What about the cane adjoining those trees, as compared with the cane along the Government road on the makai side of the field?

A. The reason the trees were planted on the easterly boundary was for protecting the cane from the wind. If there were no trees in there, you would get little or no cane anywhere from 50 to 75 feet in, but having the trees, they protect the cane and you get a fair stand of cane up to about 20 feet of the trees, or sometimes less.

Q. What was the condition of the cane along the line of the trees forming this wind-break on the easterly side as compared with the cane on the makai side, next to the Government road?

A. Much better.

Q. How do you account for that?

A. Along that piece fertilizer had been used, along

(Testimony of J. Atkins Wight.)

the easterly boundary. Fertilizer and stable manure.

Q. Hadn't that been done on the makai boundary?

A. No.

Q. Where was the burned cane milled?

A. A portion was milled at Niulii, the greater portion at Halawa and a small portion at Union Mill.

[245—218]

Q. How many tons were milled at Union Mill?

A. Eight tons.

Q. At Niulii? A. Thirty.

Q. At Halawa? A. Two hundred.

Q. Was any of the burned cane milled at any other place besides those three? A. No.

Q. Where was the unburned cane milled?

A. At Halawa.

Q. If the full field had been left unburned and had been harvested as you say it would have been in the ordinary course of events in April, May or June, *when the* sugar milled therefrom have been sold, or shipped? A. About July.

Q. At the same time as the sugar from the unburned area was shipped? A. Yes.

Q. And would have been sold at the same time?

A. Yes.

Q. Are you familiar with the mill at Halawa?

A. Yes.

Q. What would you say about the quantity of molasses left in the coolers after grinding the burned cane as compared with the quantity when you began grinding that cane? A. About equal.

Q. How about the quality?

(Testimony of J. Atkins Wight.)

A. Certain portions were inferior.

Q. Which was inferior?

A. The burned cane. [246—219]

Q. What in your opinion, Mr. Wight, would that field have produced in tons of cane to the acre, had it not been burned, and had been harvested in the ordinary course of events?

A. About 55 to 58 tons of cane to the acre.

Q. I will ask you, Mr. Wight, whether or not at Halawa at that time, the cost of harvesting and milling was kept according to the fields of the plantation? A. No.

Q. How was it kept? A. As per crop.

Q. Over the entire plantation? A. Yes.

Q. What would be a fair basis of determining what it would have cost to harvest and mill this crop if it had been harvested and milled in the ordinary course of events, and had not been burned?

A. Take the crop of 1912 as a fair average.

Q. If you take the average cost as shown by the books for 1912, I will ask you if that would run, if anything, higher or lower than what this field would have cost?

A. I think this field would have cost a little less on account of being nearer to the mill.

Q. Who can give us those figures of the average cost?

A. The bookkeeper at that time at Halawa Plantation, Mr. Mason.

Q. What was done in order to harvest and mill

(Testimony of J. Atkins Wight.)

this burned field of cane after the fire had taken place?

A. We got and stabled from Hawi Plantation 48 mules with their drivers, also a great number of wagons from Hawi; mule teams, drivers and wagons from the Kohala Sugar Company; also borrowed a traction engine from the Kohala Sugar Company, but we were not able to use it but very little owing to the [247—220] weather conditions prevailing at that time.

Q. What were the weather conditions prevailing after the time the fire occurred until the harvesting was finished? A. Decidedly wet.

Q. What had been the condition of the weather prior to the time the fire occurred? A. Very dry.

Q. Were you familiar with the vegetation growing on the sides of the road above this field and through the lauhala trees between the place where the fire started and the cane field itself?

A. The weather conditions has been very dry, and naturally the loose vegetation was dry.

Q. Could you have gotten any more assistance than you did get for the purpose of harvesting and milling this crop? A. No.

Q. What about your own plantation laborers, what proportion of them did you use?

A. Every available man was put on for harvesting.

Q. How soon was the mill started in its work of grinding this cane?

A. Ten o'clock Saturday morning, the 19th.

Q. Could it have been started any sooner?



(Testimony of J. Atkins Wight.)

A. No.

Q. Why not?

A. The mill had been dismantled, after the completion of the 1912 crop, and certain portions were to be sent to Honolulu, for repairs, and they all had to be put back again.

Q. Were they put back again?

A. Yes. [248—221]

Q. How continuously was the mill run during the period of grinding the burned cane?

A. I couldn't tell exactly the hours, but I think it was from six to 11 at night, and on one occasion to 3 in the morning.

Q. What is the normal period during which the mill is kept grinding under ordinary conditions?

A. From 6 to 5, about 11 hours.

Q. Who can supply the figures of the actual costs, disbursements for harvesting this crop and milling it? A. The bookkeeper.

Q. I am speaking as to the cost?

A. The bookkeeper, Mr. Mason.

Q. What was the condition of the Halawa Mill when it was in running shape during the 1912-1913 crop? A. Its record has been considered good.

Q. How near is this field to the mill?

A. The top end of it would be not more than a quarter of a mile and the bottom of it anywhere from half a mile to three-quarters of a mile at the most. Between half a mile and three-quarters of a mile.

Q. In using the average cost of harvesting and milling the 1912 crop as an average basis of what it would

(Testimony of J. Atkins Wight.)

have cost to grind and harvest this field in the ordinary course of events, is there anything else, any other element which would reduce the average cost, than the fact that the field was nearer to the mill?

You said a little while ago, if anything, it would cost less to harvest and mill this field if it had not been burned, than the average cost on the plantation for 1912. You have stated that one of the conditions which would tend to make it lower would be the fact that it is located near to the [249—222] mill, is there any other element? What about the stand of the cane?

A. The stand of the cane was very good, and as a rule in cutting, and especially good cane, the expense can be decreased on the individual field.

That is all. [250—223]

Cross-examination of J. ATKINS WIGHT.

Q. Was there anything else that occurred in this connection?

A. The only thing was in the harvesting. It was so wet that it necessitated us in a great many instances putting on from 12 to 20 mules to pull a load up, and the last day we had to put on more mules, and the road got so bad that the wagons sank very nearly to their axles, and we had to abandon the road coming up through the field, and cut through the field itself; the road was so bad we couldn't use it. There were places where the wheels went out of sight.

Q. I will ask you if with the assistance you were able to get and the equipment you had, if it would have been possible for you to have gotten that field

(Testimony of J. Atkins Wight.)

harvested any sooner?

A. Under the weather conditions, no. If the weather conditions were good, we might have gotten it off a little sooner.

Q. Could it have been ground any sooner?

A. No.

Q. What difference does it make, if any, to a field of cane which has been burned and is left before it is ground for a matter of 4 or 5 and up to 11 days?

A. It is a well-recognized fact that cane, after being burned, begins to deteriorate materially after the third day, and increases day after day.

Q. When was it that it first began to rain after the fire took place?     A. On the night of the 18th.

Q. The very night of the day that the fire took place?     A. Yes.

Q. And continued how long?

A. Continued right to the end of the harvesting of that field. [251—224]

Q. You said that on the 14th you and Mr. Bluett made a survey of this section of the land where the cane was burned?     A. On the 14th of this month.

Q. You assisted Mr. Bluett?     A. Yes.

Q. How high was the cane growing at the time you and Mr. Bluett made that survey?

A. Some cane was standing about that high, say about three feet to three and a half which was the highest and gradually went down to nothing, because the balance of the field had only just been harvested, I think within a few weeks.

Q. Ratoon crop?     A. Yes.

(Testimony of J. Atkins Wight.)

Q. Of the portion that was burned? A. Yes.

Q. And the higher portion, that is, the portion that had the higher cane on it, was on the portion that was left unburned?

A. No, the portion that had been cut first of this 1914 crop. Owing to the weather conditions the field was not harvested all at one time.

Q. How were you able to point out to Mr. Bluett the boundaries of the section that was burned?

A. I told him about where the boundaries were of this piece that had not been burned, and I gave him notes. I had taken measurements as soon as the unburned cane was harvested in 1913, the balance of the field being in large cane, that is, cane anywhere from three to three and a half feet in height. There were distinct contours in the land where the unburned [252—225] portion had been harvested from, and that was measured by me.

Q. As to the other portion you only gave your best judgment as to where the boundaries existed at the time the fire occurred?

A. The boundaries were most distinct because being bounded on the mauka end by young cane and the east and west by gulches. No cane intervenes with the exception of a small kuleana, therefore, the boundaries were absolutely distinct.

Q. I take it that you are quite familiar with the boundaries of that section of the Aamakao lands?

A. Yes.

Q. This is only a small section of that land?

A. Yes.



(Testimony of J. Atkins Wight.)

Q. The land on the westerly side of the gulch was another land altogether? A. Yes.

Q. And the land lying on the easterly side is another?

A. It may be Aamakao land, but it is not known to us on the plantation as Aamakao. I rather think it includes Aamakao. The boundary of that field is divided by that gulch.

Q. On the other side, or the easterly side of this land was the land planted in cane?

A. There is a gulch intervening, and beyond that a little to the mauka, there is a piece in cultivation; there is nothing below it.

Q. Kindly point that out?

A. Here is the section road running through—

Q. Section road between section 2 and 3? [253—226]

A. Yes, running east, the road comes down this gulch, very deep gulch.

Q. Gulch on the east side of the plantation?

A. Running down to a point somewhere about here, comes around here, up again here, and there is another gulch coming down here.

Q. How about the portion below, that is, towards the Government road and towards the makai easterly portion?

A. There is a severe drop from here down to the gulch where the two gulches meet, cutting this land off, and from there down to the Government road is taro.

Q. Whereabouts would be the bottom of that gulch?

(Testimony of J. Atkins Wight.)

A. Would be at a point somewhere about here.

Q. Then does the gulch follow the Government road, that is, to the makai, east corner of the land you have been talking about?

A. No, not exactly. It follows along to a point here, and then takes another direction off here coming around to the bend.

Q. Was this kuleana planted in cane at the time of the fire?     A. It was.

Q. Was it burned?     A. No.

Q. Can you tell us why the cane in this kuleana was not burned, whereas the cane between that kuleana and the eastern portion of the unburned area was burned?

A. This piece marked unburned should have been right up to this piece, this corner. Mr. Bluett did not understand my notes.

Q. Instead of having this portion on the westerly side of the section road running mauka and makai larger on the plan, it should have been smaller and the other side bigger? [254—227] That is, meeting the boundary of the kuleana?

A. No, simply this portion as shown, should have been shifted a little further over so as to meet that "X" mark on the boundary.

Q. Was there any natural protection between the kuleana and the field on the mauka side of the kuleana and section 2?

A. Yes. First of all there was a fence running between there, and there is anywhere from 4 to 5 feet left between the fence and the first row of cane,

(Testimony of J. Atkins Wight.)

4 to 5 feet on the mauka side and makai side, leaving a space of 8 to 10 feet between the two lines of cane, and the wind coming the direction it was, was blowing away instead of on to the Freitas portion.

Q. Was there any ironwood trees along the Government road which marks one side of the Freitas property?     A. No.

Q. Along the Freitas property is the Government road much lower than that portion marking one boundary of the unburned area?

A. This portion here there is little or no difference, but as it goes down the gulch there is considerable.

Q. The easterly boundary of the land on which the cane was burned, which you showed to Mr. Bluett, was that also the boundary of the Aamakao land?

A. It was the boundary up to a certain point.

Q. Did you plant the trees on the land or near the boundary?

A. The bottom of the gulch, the stream bed is the boundary of that Aamakao land.

Q. This is the cane boundary, then, that you pointed out, only the cane boundary?     A. Yes.  
[255—228]

Q. The real boundary follows along the bottom of the gulch?     A. Yes.

Q. As marked here?     A. Yes.

Q. How far were these ironwood trees planted on the easterly boundary of the land from the cane?

A. Planted from the edge of the gulch. The trees

(Testimony of J. Atkins Wight.)

are planted some five or six feet down the side of the gulch.

Q. From the top?

A. Yes, this being the top where the cane is growing, the trees are planted five or six feet, perhaps ten feet, down on the slope.

Q. Giving a distance, then, of about ten feet from the cane to the trunks of the trees along the ground?

A. Yes.

Q. The trees were planted, I believe, for wind protection? A. Yes.

Q. The land along that easterly portion of the section you have been talking about, is it higher or lower?

A. Some portions are level and on other portions there is a slight rise.

Q. The rise occurs at the mauka easterly corner?

A. At about the point where that mark is.

Q. Where the letter "A" is marked?

A. From there to the bottom is very level, from there to the top there is a bit of a rise.

Q. Was the cane before it was burned along the row of trees on the easterly portion of this land the same as the rest of the cane towards the middle of the field, or was it inferior? [256—229]

A. Just about the same.

Q. On what side would the difference be?

A. No difference, only a little inferior.

Q. Say for a distance of about how many feet?

A. Not more than twenty feet, at the most.

Q. A little inferior to the balance of the field?



(Testimony of J. Atkins Wight.)

A. Yes.

Q. The cane on the unburned area near the Government road you say was inferior to the balance of the cane, the inferiority was due to the trees?

A. Yes.

Q. And you considered that cane inferior to the cane along the easterly boundary of the field?

A. Yes.

Q. Due to the fact that you had fertilized the easterly boundary of the cane fields?

A. Certain portion of it.

Q. And had not along the makai boundary of the unburned area? A. Yes.

Q. What portion did you fertilize along the easterly boundary?

A. All of this corner in here running back into here, almost up to this section road—approximately, I can't give it exactly.

Q. Then along the point from say B, that is along the easterly portion of section 2, to a point marked C. on this plan you fertilized?

A. Yes, with stable manure.

Q. And also from the point marked A on this diagram to the mauka easterly corner of section 3?

A. Yes. [257—230]

Q. And towards the west? A. Yes.

Q. So between C and A of the easterly portion of the land that was swept by the fire, you did not fertilize? A. No, not with stable manure.

Q. Did you fertilize it in any way?

A. High-grade fertilizer.

(Testimony of J. Atkins Wight.)

Q. Is that superior to manure or inferior, as to the results?

A. That is a pretty hard question to answer, because the two fertilizers act differently, more or less, one acts on the cane itself, while the other stimulates the ground, so that it is pretty hard to compare the two.

Q. Is there anything that existed at that time which caused you to fertilize the easterly boundary from B to C and from A to the mauka easterly corner, and not fertilize rom C to A?

A. Yes, the previous crop, more particularly that section had been poor in cane, which decided me to apply stable manure, to increase the fertility of that soil.

Q. Then do I understand you to mean that manure is better than high-grade fertilizer?

A. Stable manure was applied to that place and also high-grade fertilizer to that place as well, but the stable manure increased the fertility of that soil.

Q. From the mauka easterly corner of the section 3, along the easterly boundary to the point adjoining the Freitas kuleana that was all fertilized with this high-grade fertilizer? A. The whole field.

Q. And added to this high-grade fertilizer, was this manure? A. Yes. [258—231]

Q. Would that make the fertility of the land along B to C equal to that from C to A? A. Yes.

Q. C to A, then, was not as poor before you started in to fertilize as C to B? A. No.

Q. Did you put any manure along the other bound-

(Testimony of J. Atkins Wight.)

aries at the mauka part?

A. No, not on the boundary.

Q. Commencing on the boundary and working in?

A. I did.

Q. Manure on the westerly boundary of the land and working in?      A. Certain portions.

Q. You refer to portions that were in the same conditions as the portion between C and B?

A. More or less.

Q. Where did you put manure on the land?

A. Manure was put on places known to be poor, and on the rises, the more exposed portions of the field.

Q. You considered the higher elevations not as good as the others?      A. Certainly.

Q. Throughout the whole field, did you put on high grade fertilizer?      A. Yes.

Q. Including the unburned portion up to the Government road?      A. Yes.

Q. You didn't put manure on the makai boundary of the unburned portion?      A. I did not. [259—232]

Q. For the reason that it didn't require manure?

A. I didn't notice if it required it or not, and of course it was a distance from the mill, and also the supply was not enough. If there had been enough, that portion might have got it, and might not. In applying manure, the idea is to get the nearest point, instead of taking it a distance.

Q. Did you prefer to apply it to land very poor in fertility?      A. Certainly.

(Testimony of J. Atkins Wight.)

Q. But you didn't consider that this portion along the makai side of the unburned area was poor in fertility?

A. I didn't to the extent that it would require stable manure.

Q. About how wide were these section roads?

A. Twelve to fifteen feet.

Q. Now, coming back to the proposition of back-firing the fields. I believe you stated that when you came to the junction of those two section roads, you did something there?

A. I did; I tried to back-fire.

Q. Whereabouts?

A. I was on the north and south road.

Q. About what time was that when you reached that point?

A. Eight or thereabouts, or shortly after.

Q. When you got there, I will ask you were you there before Mr. Watt and Mr. Watt's men got there? A. Before.

Q. How far had the fire gone into the field at the time you arrived at this junction?

A. It was near this section road here.

Q. Pointing, now, in section 2 at a point about 200 or 300 feet away from the section road? [260—233]

A. I think approximately 200 to 300 feet from the section road, from the mauka-makai section road.

Q. Had it proceeded in a manner parallel to the upper part of the section road, in this manner?

A. I wouldn't say just exactly, but the course of that fire would have been from this point across this



(Testimony of J. Atkins Wight.)

way, diagonally across with the direction of the wind.

Q. In this manner?

A. Yes. (Indicating from the point where the fire entered the field toward the junction of the 2 section roads.)

Q. In which way was the fire proceeding; did it go faster along the line you have indicated, and slower mauka and makai?

A. I wasn't makai, so I couldn't say. Naturally it would be slower on the makai side.

Q. Before starting to back-fire did you cut away any cane along this section road? A. I did not.

Q. Did you order any cane to be cut?

A. There were no men to cut it when I got there.

Q. Did you go there alone?

A. I was the first man to get there from the plantation section. Two other men came from makai, one man was a road man and the other was a luna working makai who had a horse and naturally got there quicker than the men on foot.

Q. The other man was Kukui?

A. I think I told him to back-fire.

Q. Where did he start?

A. I don't know if he did or not. I told him to start on this makai side of the section road running east and west from the corner, running towards the gulch. [261—234]

Q. Which section did you take?

A. The one running mauka and makai on the east side of that road.

Q. Did the fire burn into field number 2, the fire

(Testimony of J. Atkins Wight.)

which you had started?      A. Yes.

Q. How far had the fire which you started gone into the field before the fire across the section road started?

A. Only a few feet.

Q. Which field started first, No. 3 or No. 1?

A. Number 1, to the best of my knowledge.

Q. How soon was it after you had started to back-fire when you noticed that field No. 1 was on fire?

A. Only a few minutes.

Q. At that time the wind was blowing a pretty stiff gale?

A. Yes, and of course, the fire makes its own wind.

Q. You say only a few minutes, what is your idea of a few minutes.

A. I wouldn't say more than five minutes.

Q. About what point was that fire in section 1 when you first saw it?

A. The point marked "D" on this map. Perhaps a little higher.

Q. Inside the field?

A. I don't know the distance, but it seemed to me it might be 50 or 60 feet inside. There is a hollow there.

Q. At that time had the fire in field No. 2 reached the place where you had been burning in order to back-fire?

A. The flames were rising up in here anywhere from 30 to 40 feet, carrying with it, of course, a great deal of trash before the fire had reached the road, before burning inside.

(Testimony of J. Atkins Wight.)

Q. Was there any cane intervening?

A. There was cane intervening between the two fires.

Q. How much cane? [262—235]

A. I couldn't say, I couldn't go in to measure it.

Q. When did you first notice the fire in section 3?

A. Considerable time after I had cut the roadway through section No. 1.

Q. After you noticed the fire in No. 1, at the point D or a little above point D, you then went mauka along the section road running mauka and makai?

Q. Yes.

Q. To a point about where?

A. To a point marked "E."

Q. From there you started to cut a roadway?

A. Yes.

Q. From the point E along—

A. Line following the direction of the fire to the point marked F.

Q. Had you succeeded in cutting that line right through before the fire went beyond that line on the mauka side?

A. I couldn't say, we couldn't see. It tried to jump on two or three occasions, but the men behind put it out, but whether this was completed, I don't know. We couldn't see, the smoke was coming right in through here.

Q. I believe you stated on your direct examination you attempted to cut another line somewhere?

A. I did not.

Q. Only one line?

(Testimony of J. Atkins Wight.)

A. That is all I attempted to do.

Q. Did some one else?

A. Yes, this lower portion, a roadway was cut from this point.

Q. You mean a point on the west boundary of the Freitas cane?     A. Yes. [263—236]

Q. Along the mauka boundary of the unburned area?     A. Yes.

Q. That is where Mr. Watt had his men?

A. Mr. Watt and the Niulii men.

Q. Did you have anything to do with cutting a line through the cane field on the west portion of the unburned area?

A. I did not myself. They were through working just as I got there; the head luna of Kohala was superintending that work.

Q. The distance between the mauka and makai boundary is between half a mile and three quarters of a mile?     A. I have never measured it.

Q. To the best of your judgment?

A. I would hardly say more than half a mile, slightly under that or thereabouts.

Q. Is the mauka end much higher than the lower end?

A. Certain portions of it a little higher and one point is considerable higher.

Q. That point is the easterly end?     A. Yes.

Q. What, if you know, is the difference in the altitude?     A. I couldn't tell you.

Q. On a general average the cane on the mauka end is similar to the cane along the makai end?



(Testimony of J. Atkins Wight.)

A. Little or no difference.

Q. If there is a difference, what is the difference?

A. Higher elevations on the points more exposed, it is a little inferior in growth.

Q. As the land starts from the Government road running mauka, is there a gentle rise? [264—237]

A. Yes and no. It rises a little and there will come a hollow, and a rise again and a hollow. It is a very undulating field.

Q. Whatever rises there are are not very marked?

A. One or two places are rather marked, the east mauka corner, and a little right along this gulch.

Q. Along the west boundary starting from the mauka westerly corner of the map? Running about one-third of the distance? A. Yes.

Q. When you say yes or no as to the rise in the land from makai to mauka, does that mean that there was some difference in the rise along the entire boundary of the land along the Government road?

A. There is a difference there, the road coming up to a point more or less like this, what we call a hog-back.

Q. That back then, is at the point where the mauka-makai section road intervenes with the Government road? A. Yes.

Q. How far back does that back run in that manner? A. Possibly 150 to 200 feet.

Q. Then goes down?

A. Yes, running east and west.

Q. What grade would you say that rise is from the Government road to this hog-back?

(Testimony of J. Atkins Wight.)

A. I should say 5 to 6%.

Q. That hog-back is practically along the section road?

A. Yes, that was the idea of putting that section road there, because that was the poorest piece of land.

(Court takes recess at 1:30.) [265—238]

(AFTER RECESS.)

Mr. OLSON.—With permission of the Court and counsel, I would like to ask a few more questions.

Q. Mr. Wight, this field of cane which was swept by this fire, I will ask you in regard to it whether or not any further expense would have been incurred by the plaintiff in connection with that crop until the time when the harvesting thereof would have begun if the fire had not taken place?

A. There would not.

Q. Up to the time of the harvesting?

A. There would not.

Q. The only expense then in connection with that crop then would have been the harvesting and the grinding and the marketing of the same? A. Yes.

Cross-Examination (Continued.)

Q. When you say there would have been no further expense from the time that it was burned up to the time it would have been harvested, I take it that there would have been no stripping of the cane from the 18th up to the time it was milled?

A. No stripping would have been done, it would not have been stripped.

Q. Is there very much stripping done in the Dis-

(Testimony of J. Atkins Wight.)

trict of Kohala?      A. No, not at the present time.

Q. No weeding of any kind?      A. No.

Q. Any irrigation expenses?

A. The field was not irrigated? [266—239]

Q. How about the rental value between the 18th up to the time of the milling, would that not be considered as an expense?

A. Not considered with the operation, it doesn't come in with the operation of the field.

Q. Would it not be an expense chargeable to the crop?      A. Chargeable to the crop.

Q. What was the rental value of that field?

A. I couldn't tell you because we charge everything to the crop, we have no field account, simply keep a crop account.

Q. What was the entire rental?      A. \$15,050.

Q. Are you familiar with the rental value in that vicinity for cane land?      A. Not particularly.

Q. During your time did you rent land from other people, similar to this?      A. No.

Q. Did you or the bookkeeper keep a record of the rents so as to have the same chargeable to the crop at the end of the year, or the time of harvesting the crop?

A. That, I think, is under the bookkeeper.

Q. I wish to get from you definitely, Mr. Wight, this, it is a proper charge against the crop, the rental value of the land where you have leased land under cultivation?      A. Yes, I should say it was.

Q. When did you expect this Caledonia came on the field that was burned to tassel?

(Testimony of J. Atkins Wight.)

A. Under ordinary conditions it generally tassels in the latter part of November and December if it tassels at all. [267—240]

Q. And you say when it does tassel, it reaches maturity? A. Reaches maturity, yes.

Q. It develops, however, to a further extent where-by you can get better results?

A. Cane is not supposed, it is not proper under ordinary conditions to cut cane at the time of tasseling because the juice is not as good as it is later, say from six weeks to two, three, four or five months.

Q. These trees growing on the makai side of this field were along the Government road or along the whole land?

A. I don't just remember now whether the fence was inside the trees or outside, but they were close to the fence and the trees were running close to the road and there was not very much difference between the fence and the trees.

Q. That portion was planted out as a wind-break?

A. I believe not, simply to beautify the road. They were planted by my grandfather.

Q. Planted in about the same manner as the trees planted along the east boundary of this land, that is, the trees on the east boundary of the land planted to serve as a wind-break?

A. I don't think that was the intention when the trees were planted. Those on the east side, yes.

Q. I mean to say this, were these trees along the Government road planted in a manner similar to that along the east boundary?



(Testimony of J. Atkins Wight.)

A. No, because the position was different.

Q. Just explain how.

A. The trees on the east boundary of the burned section were running mauka and makai acting as a direct wind break; the trees on the Government road were running this way, almost parallel with the wind. [268—241]

Q. Were there any trees along the Freitas boundary along the Government road?

A. There was not, not any ironwood trees, there was some brush, shrubs, not trees.

Q. About how high?

A. Growing about four or five feet, possibly six at times. We call it shrubbery, not a tree.

Q. The Freitas property, would that slope downwards toward the road? A. Which way?

Q. Road on the east side? A. Slightly, yes.

Q. Was that slope continuous slope from the burned area on the east side of the section road running, mauka and makai?

A. It was a slight slope right down to the Government road.

Q. Was that shrubbery along the road or along the fence? A. Those shrubs were not continuous.

Q. This portion that you said was higher than the other portions that is the portion at the mauka, east corner of the land, is that such a rise as placed it against the wind? A. Certain portion of it, yes.

Q. And I believe you said there was another portion exposed to the wind in a similar manner?

A. On the west side.

(Testimony of J. Atkins Wight.)

Q. The west, mauka corner?

A. No, the west running mauka and makai, you have got it marked there, the west boundary?

A. This point here?      A. The top point.

Q. Beginning at about the junction?

A. No, further toward the left. [269—242]

Q. That is from the point F then say about 100 to 150 feet from the west boundary, running up to the mauka boundary?      A. Yes.

Q. About the same distance from the east boundary, between 100 and 150 feet?

A. Gradually sloping down into the middle of the field.

Q. Any part near the section road running mauka and makai exposed to the wind?

A. Not particularly.

Q. When you say that you mean less exposed than the other portions mentioned?      A. Yes.

Q. How much less?      A. A good deal less.

Q. Any other in field No. 1?

A. In field No. 1, a piece about in here, small piece.

Q. That is commencing from the point H on the diagram to the point G, so that the small portion of the field on the west side between G and H was exposed to the wind?      A. To a certain extent.

Q. Any other portion?      A. No.

Q. What was the grade of the decline from the section road running up and mauka to the Government road on the west boundary of the Freitas property?

A. From the start of the road little severe and

(Testimony of J. Atkins Wight.)

from there down it is a gentle slope through the Freitas piece.

Q. From the section road, the decline was marked?

A. Yes. [270—243]

Q. For a distance of how much?

A. Very nearly down to the Freitas fence on the west boundary.

Q. Then the difference—

A. Not very much difference. The Freitas piece is a little more level than the balance. Not very much.

Q. About what was the grade?

A. I couldn't tell you, I am no surveyor.

Q. Was it the same grade as the road, the section road? A. I should say a little more severe.

Q. I believe you stated the other day that the cane was growing about 250 feet away from the road at the point where the fire entered the field. The cane was growing about, at a point, about 250 away from the place where the fire started on the road?

A. I imagine about that.

Q. From the point where it started on the road to the point where the fire entered the cane field?

A. Yes, about 250 feet.

Q. The reason why you didn't plant cane up to the road was because there was a lot of lauhala trees there?

A. It had never been planted from the top of the gulch down the slope, down where the fire started, never been in cultivation, owing to the severe slope for one thing, and the place was wind swept which

(Testimony of J. Atkins Wight.)

would be another objection.

Q. And that portion was covered with lauhala trees? A. Yes.

Q. Where was your home?

A. Right above the mill.

Q. About how far from this field?

A. Same distance as the mill.

Q. About a quarter of a mile? [271—244]

A. From the top end, yes.

Q. And about a half a mile to three-quarters or a mile— A. From the bottom end.

Q. You said on your direct examination that the weather conditions previous to the fire were very dry? A. Yes.

Q. About how many months had it been in that condition?

A. I think somewhere between three and four months.

Q. And you say the vegetation was dry all along the road where this fire occurred?

A. Fairly dry, yes.

Q. As distinguished from very dry you say fairly dry?

A. Fairly dry is my recollection. There was nothing to make me pay particular attention to it. There had been no rain.

Q. How were the leaves from the lauhala trees?

A. The dead leaves naturally were very dry.

Q. I am asking you whether you knew they were dry?

A. Not necessarily. I said knowing it from the



(Testimony of J. Atkins Wight.)

weather. It had been very dry and naturally the leaves would be dry. I didn't go and examine them.

Q. Can you say of your own knowledge that they were dry? Not from your conclusion of the weather conditions, as to whether they were dry or not.

A. You might know in your own mind that they were dry, but at the same time would not like to swear positively they were, but when put to swearing to it you couldn't do it, at least I wouldn't care to.

Q. Which way did you come to the field, along the section mauka?

A. Mauka-makai. [272—245]

Q. So I take it you did not see any lauhala grove on the side when you reached there?

A. I did not.

Q. After the fire was out, which was some time after nine, did you examine the location where the fire started from? A. I did.

Q. Also the land under the lauhala trees?

A. I didn't go under the lauhala trees, but standing from the road I could see where the fire passed.

Q. Did it burn all the lauhala leaves? A. Yes.

Q. Standing from the road before the fire occurred you could see these trees, the lauhala leaves?

A. Certainly.

Q. What was the cleared space between the cane field and the lauhala grove? Did the lauhala trees grow right up to the top of the cane field, that is, to the point where the cane was planted?

A. No. There were a lot of pine trees between. Pine trees were right along the edge of the cane as

(Testimony of J. Atkins Wight.)

I said before, about six feet down the side of the gulch, and then came the lauhala trees from that down.

Q. The pine trees started, I believe you said, from the Freitas corner?     A. Yes.

Q. How far were the lauhala trees from the iron-wood trees?

A. I never measured it, but I don't think very far.

Q. Approximately?     [273—246]

A. I suppose from between fifteen and twenty feet, and between that there was quite a lot of maniania grass growing up to the edge of the cane field.

Q. The maniania grass was dry?

A. I couldn't say, I didn't examine it, but I imagine it must have been for the fire to take hold of it.

Q. When you went there after the fire, it was all burned?     A. Yes.

Q. Did you notice whether the grass which was not burned was dry or green?     A. Semi-dry.

Q. The maniania grass extended right to the cane?

A. Yes, and dry leaves from the pine trees extended to the cane field.

Q. You say that you have made estimates of cane crops for the last 12 years?

A. Thereabouts.

Q. Have you found your estimates to be accurate?

A. Very reasonably so.

Q. Have you ever fallen short of your estimates?

A. I have always gone over my estimates. If I

(Testimony of J. Atkins Wight.)

have estimated that we were going to get 12,000 tons of sugar for the year, in all probability I have got 14 to 15, I have never gone the reverse.

Q. Not once?      A. No.

Q. Do you know what the 1914 crop of the plantation is?

A. A little over 1900 tons, if I remember correctly.  
[274—247]

Q. Has the entire 1914 crop been completed?

A. Up to the time I left Kohala it had not been completed, the harvesting had not been completed.

Q. What was that, then, when you said it was 1900 tons?

A. I thought you asked me the tonnage of the 1913 crop, the total tonnage.

Q. In making your estimates of cane crops, did you include in your estimates the cane milled for other people?

A. What do you mean, for other people?

Q. Did some other planters, for instance, Freitas, have their cane milled at Halawa?

A. As a rule we give the plantation cane, and the approximate tonnage of the planters. We have what you call individual planters there.

Q. When was the sugar from the burned cane shipped?      A. In November, I think.

Q. Would your bookkeeper's accounts show that?

A. Yes.

Q. Where was it shipped to?

A. San Francisco.

(Testimony of J. Atkins Wight.)

Q. At what time is the price fixed on your shipments of sugar, when it reaches San Francisco, or at the time it leaves the place?

A. At the time it arrives at San Francisco, the day before, I believe, to be correct.

Q. And the market price is determined upon the market price of New York, less a quarter of a cent?

A. Yes, five dollars a ton.

Q. You figure a ton at 2000 pounds?

A. Yes, less a quarter of a cent. [275—248]

Q. Do you figure any loss on sugar while on the way from your mill to its destination?

A. Yes, there is a certain amount of loss.

Q. Through what?

A. Deterioration and leakage.

Q. What is the percentage?

A. It runs anywhere from one-half per cent to one per cent.

Q. Who bears that loss, the plantation or the steamship company? A. The plantation.

Q. Between one-half and one per cent?

A. Yes.

Q. Is that covered by insurance?

A. The sugar is all insured, yes.

Q. Loss in that manner? A. I think not.

Q. Who pays the freight on the sugar?

A. The plantation does.

Q. At the Mahukona landing is there any wharfage fees?

A. That is included with the freight.

Q. Is there any territorial wharfage fee?



(Testimony of J. Atkins Wight.)

A. Not that I know of.

Q. How do you generally ship the sugar, direct from Mahukona to San Francisco?

A. Yes, all direct by sailing vessel.

Q. Your bookkeeper has the average freight lists?

A. The bookkeeper will give you that information.

Q. You cover your shipments by insurance?

A. Yes.

Q. And your bookkeeper has that?

A. He will give you that information, also.

[276—249]

Q. That is, the freight, the insurance is all charged—

A. All charges will be presented.

Q. Those are items chargeable to the crop, insurance, freight?

A. Yes, I think they are kept under separate items, if I am not mistaken, but the bookkeeper can enlighten you on that matter.

Q. That is also true as to transportation of cane from the field to the mill?

A. You will get all that information from the bookkeeper.

Q. How about taxes, Mr. Wight, on the crop of cane that was burned, you saved a certain portion of taxes, did you not, that is, the cane would have been harvested in April, May or June, and the assessment would have been made in the month of January, 1913. This cane did not exist at that time, therefore, you saved some taxes. Plantations are taxed as a growing concern, is that not correct?

(Testimony of J. Atkins Wight.)

A. Yes.

Q. Don't tax the cane itself?      A. No.

Q. Would that fact, that the cane had been burned, make some difference in the assessment of the plantation?

A. I think the bookkeeper can give you that better than I can.

Q. Who makes the returns, you or the bookkeeper?      A. The bookkeeper.

Q. Do you recollect whether or not you told the bookkeeper to be careful in making the returns for the field that was burned?      A. I do not.

Q. In making the returns for taxation purposes, you take into consideration the amount of cane growing, on the 1st of January?

A. Yes. [277—250]

Q. And the fact that there was no cane growing on this field had some bearing then on the assessment?

A. There was cane growing on it.

Q. It had been burned, had it not, on the 18th of October?      A. Yes.

Q. But what it had in cane, then, was the ratoon crop?      A. No plant cane, no.

Q. There was a difference, was there not, between that ratoon crop and the crop that had been burned, if it had been standing?

A. Yes, there would have been a difference.

Q. The total assessment would have been much higher, would it not, if the cane had been standing?

A. It would.

(Testimony of J. Atkins Wight.)

Q. About these tanks, I think you said they had a capacity of 15 tons?

A. Fifteen tons of sugar, yes.

Q. How many tanks did you have?

A. Twelve large tanks, and 14 smaller ones, or about half and half, the large ones were about two more than the small ones, I think about 14 to 12.

Q. Which ones had a capacity of 15 tons?

A. The total capacity of those tanks was between 12 and 15 tons of sugar. How I happen to know that, I was boiling sugar at Halawa a good many years and we always took the capacity of those tanks at the end of the crop as running between 12 and 15 tons of sugar.

Q. How often were these tanks filled up during the period you took off this burned cane? [278—251]

A. I know they were all empty ones, but how much more I do not know, but before we took off that burned cane they were all full when the burned cane arrived, also when we finished they were full again with new material.

Q. When they were all full before you milled the burned cane, you didn't add that to the 200 tons, did you, of the burned cane? You didn't add the product of these tanks which were full before you milled the burned cane to the output of the burned cane, did you?

A. Yes, that had to go into it as part of the 200 tons.

(Testimony of J. Atkins Wight.)

Q. Then the result of the burned cane was not 200 tons?

A. Yes, the tanks were filled with the residue of the burned cane which made it equal, in fact there was a little more sugar obtained from the burned cane than there would have been, but one more or less offsets the other. There is no material difference.

Q. How many times do you generally boil your molasses?

A. Three to four times, rather two to three, boiling the molasses.

Q. When you said three to four, what did you refer to?

A. Including No. 1 sugar, taking the first, second and third sugar, there are only two boilings of the molasses?

Q. When you get your No. 1 sugar, after that molasses?      A. From that No. 2 sugar.

Q. After that?

A. Third grade and sometimes fourth grade sugar.

Q. The output decreases as you increase the number of boilings?      A. Certainly.

Q. Is there any fixed percentage of decrease?

A. No. [279—252]

Q. Are you generally able to boil your molasses three times?

A. As a rule, unless we get some very poor cane.

Q. The cane that was burned, that was considered good cane, wasn't it?



(Testimony of Arthur Mason.)

A. It was good cane as it stood, but if it had gone to maturity it would have been excellent cane.

That is all. [280—253]

**[Testimony of Arthur Mason, for Plaintiff.]**

Direct Examination of Mr. ARTHUR MASON.

Q. State your name, please.

A. Arthur Mason.

Q. Where do you reside? A. Kohala.

Q. How long have you resided there?

A. Thirteen years.

Q. In the year 1912, speaking particularly with reference to the month of October, and during the months succeeding, that same year, and throughout the next year, what was your occupation?

A. In connection with the Halawa Plantation, I had charge of the books and accounts.

Q. Did you have charge of the disbursements and receipts of money? A. Yes.

Q. Do you remember a fire which took place at Halawa, on the 18th of October, 1912?

A. Yes.

Q. Can you state, either from your memory or from your books, what expense was incurred by the Halawa Plantation in the harvesting and milling of the cane from the burned area?

A. Yes, not from my memory, but I have got extracts from the books which I made at the time.

Q. Have you got the books? A. Yes.

Q. What books are you referring to now?

A. The ledger and the cash-book. The total ex-

(Testimony of Arthur Mason.)

penditure for milling and harvesting was \$4,208.75. The sum of \$25.79 should be taken off of that.  
[281—254]

Q. The total expense of harvesting and milling was \$4,208.75? A. Yes.

Q. As shown on sheet No. 1 of Account 51 of the ledger? A. Yes.

Q. And there should be deducted from that—  
A. \$25.79.

Q. And what does that represent?

A. The cost of harvesting and the cost of milling.

Q. Where do you get that from, the journal?

A. Various pages of the journal and cash-book. \$15.50 item paid to the Hawi teamsters who assisted in hauling the cane; the next \$2,733.73 is made up of \$5.40 for twine for sewing bags; \$1,928.82 labor for harvesting; \$773.72 part of the milling expenses, then comes that item of \$25.79, which I have taken away.

Q. You said \$25.79 was deducted, why should that be deducted?

A. That is for hauling the sugar down to the railroad, you would have to haul the sugar down in any event, if there had not been the fire and the sugar had gone to maturity, we would have had to haul it.

Q. For this same amount of sugar you would have had to pay that amount of \$25.79? A. Yes.

Q. These items just referred to are from your journal on page 145.

A. \$172.30 paid on the first of November to Mr. Von Arnswaldt, page 281 of the cash-book, for his

(Testimony of Arthur Mason.)

services. The next item is \$347.05, consisting of \$334.05, harvesting expense of the Koahala Sugar Co., and \$13 for oil and rubber packing for the mill.

Q. As shown in the cash-book on page 283?  
[282—255]      A. Yes.

Q. The next item is shipping sugar?

A. That to the best of my recollection was insurance, part of the insurance, page 148 of the journal.

Q. The next item of cash on page 285 of the cash-book?

A. \$208.50, labor of harvesting, paid in cash.

Q. Next item of—

A. \$32 on the same page, part of the expense in cutting.

Q. Next item of \$30.80.

A. The amount paid to Puakea Plantation for teamsters and wagons.

Q. Also on page 285 of the cash-book?

A. Yes. On page 289 of the cash-book, \$608.70 paid for bags for that sugar.

Q. Sugar from the burned cane?      A. Yes.

Q. Next item of \$31.50?

A. Feeding the men during overtime.

Q. On page 289 of the cash-book?

A. Yes.

Q. Does that complete the list?      A. Yes.

Q. You have now given us, have you, the total cost of labor in harvesting, all costs and expenses in harvesting and milling the sugar from the burned cane?

A. Yes.

(Testimony of Arthur Mason.)

Q. From this field burned on October 18th, 1912?

A. Yes.

(Recess for 5 minutes.) [283—256]

(AFTER RECESS.)

Q. Let me ask you, Mr. Mason, was anything received, without stating what it was, was anything received by the Halawa Plantation for the cane which was ground at Niulii Mill? A. Yes.

Q. What price was received, not the amount, but what price, the market price or any other price?

A. We received the market price that Niulii got for that sugar.

Q. By whom was that sugar shipped and marketed?

A. Shipped by Niulii at the same time that from Halawa was shipped.

Q. And where was it marketed?

A. San Francisco, the Western Refining Company.

Q. What price was received on that sale at San Francisco?

A. The market price received by Niulii.

Q. Can you give us the amount received for that 30 tons of sugar ground at Niulii? A. \$2,000.

Q. Have you the account sales?

A. No. Niulii Mill shipped our sugar with their own, with the result that we got a better polarization, which meant that we got a better price.

Q. And the total was \$2,000? A. Yes.

Q. Was the same true as to the sugar which was



(Testimony of Arthur Mason.)

ground at Union Mill? A. Yes.

Q. The market price was received, when that was shipped? A. Yes, same ship. [284—257]

Q. What amount was received by Halawa for the sugar ground at Union Mill? A. \$452.66.

Q. For the 8 tons? A. Yes.

Q. The price received per ton was greater, therefore, as to the 30 tons that were ground at Niulii?

A. The price for the 30 tons at Niulli was greater than at Halawa.

Q. And Union Mill?

A. Union Mill amounted to less because they charged us the milling expense which Niulii did not.

Q. The milling expense was gratuitous on the part of Niulii, no charge was made therefor?

A. No.

Q. In the amount that was realized from Union Mill, you say the mill expense was deducted, and not at Niulii? A. No.

Q. What did Union Mill charge you for the milling expense?

A. I cannot tell you now the amount.

Q. But that was deducted? A. Yes.

Q. Was that a charge made by Union Mill for the milling of that sugar at Union Mill? A. Yes

Q. Could you have got that milled for any smaller amount than the amount they charged you?

A. No.

Q. How much was realized by the Halawa Plantation for the 200 tons ground from the burned cane? [285—258] A. \$12,633.83.

(Testimony of Arthur Mason.)

Q. That sugar was marketed at San Francisco?

A. Yes.

Q. And at the market price—what *they* was the average price per ton realized by Halawa for the 238 tons, the yield of the burned area?

Question withdrawn.

Q. Mr. Mason, is this \$12,633.83 the net realization or the gross?

A. That is the net, no milling expense taken away at all?

Mr. HEEN.—Was that the amount received according to the market value?     A. Yes.

Q. The gross or the net?

A. That is the net amount received for the sugar, after deducting railroad freight, ship's freight, insurance, analyzing, weighing and delivering and commission.

Mr. OLSON.—Mr. Mason, when was that sugar marketed in San Francisco?

A. I cannot give the exact date, but approximately about the 23d of December. I should perhaps explain that the price of sugar is regulated as of the day before the sugar arrives at San Francisco.

Q. According to your account sales, Mr. Mason, what date would that be?

A. It left Mahukona on the 14th of November, 1912.

Q. Can you find for me, Mr. Mason, the date that arrived at San Francisco?

A. No, I cannot exactly, but the account sales

(Testimony of Arthur Mason.)

themselves show the basis or market price for the day on which we were paid. [286—259]

A. It was all shipped at the same time?

A. 238 tons shipped at the same time.

Q. According to the account sales, what was the market rate on the day it arrived at San Francisco, or the day before? A. 3.98 per 100 pounds.

Q. What was the approximate date of its arrival in San Francisco?

A. Approximately between the 11th and 13th of December.

Q. About the 13th of December.

A. About the 13th.

Q. Mr. Mason, what were the gross receipts on that shipment of 238 tons on that basis in San Francisco? A. Gross amount in San Francisco?

Q. The gross upon that basis of 3.98 per 100 pounds? A. \$14, 226.03.

Q. That is for the 200 tons? A. Yes.

Q. What were the charges against—that was for the 200 tons, now what was charged against that sum of 14 thousand odd dollars testified to?

A. Railroad freight from the plantation to

Mahukona,.....\$453.60

Vessel's freight from Mahukona to San

Francisco,.... 549.10

Analysis, San Francisco Analysis..... 15.

Marine Insurance..... 97.80

Weighing and delivering..... 49.92

Commission.... 426.78

(Testimony of Arthur Mason.)

Q. At what per cent is that commission?

A. At 3%.

Q. I will ask you whether or not, Mr. Mason, these are the usual charged?

A. Those are the usual charges.

Q. Customary?

A. Regular charges. [287—260]

Q. Leaving the net amount from that sum of how much? A. \$12,633.83.

Q. Taking that net amount with the net amounts received from the 38 tons milled at Niulii and Union Mill, which you testified are respectively \$2,000, and \$452.66, that makes the total net receipts how much for the 238 tons? A. \$15,086.49.

Q. Making an average price of how much per ton?

A. \$63.39.

Q. Now I want to ascertain from you, Mr. Mason, if you can also state or give us the same figures for the sugar from the unburned area of the field which was swept by the fire?

A. Yes, I can give you that, that was shipped on the 11th of July, 1913.

Q. What was the date on which the market price or basis of that was fixed?

A. The market price was fixed on the 6th of August, 1913, so I presume she arrived on the 7th.

Q. And from the market price or basis upon which the rate is calculated there has got to be a deduction of one-quarter of one per cent?

A. One-quarter of one per cent is deducted on all sugar received by them, and the amount received is



(Testimony of Arthur Mason.)

based on the polarization of the sugar.

Q. How much then was the gross amount received for the sugar from the unburned portion of the field?

A. I haven't worked it out that way, we shipped it with other sugar, and from the total amount of that shipment was taken the average receipts.  
[288—261]

Q. Can you work that out, Mr. Mason, on the basis of the number of tons from that unburned area, and the gross amount received on the New York basis for that day? The total number of tons was how much? A. 37.22.

Q. How much did you receive, what rate did you receive on the 37.22 tons?

A. 3.481, that was the net according to polarization, and after deducting that quarter of a cent. You have got to segregate all these shipping charges.

Q. That is 3.481 per 100 pounds, is that it?

A. Virtually 69.62 per ton.

Q. Or at the rate of— A. 69.62 per ton.

Q. And there were— A. 37.22 tons.

Mr. OLSON.—I think we would save a great deal of time by taking the adjournment at this time until to-morrow morning, and get the figures all worked out.

(Court adjourns.)

Nov. 24, 1914.

Q. I think you have already testified that the net realization from the 238 tons from the burned sugar was \$15,086.49; that is correct? A. Yes.

Q. Therefore, the average price per ton, or re-

(Testimony of Arthur Mason.)

ceipts per ton, net receipts per ton, realized was.

A. 63.39.

Q. And what the average net price realized for the unburned area per ton? [289—262]

A. \$60.72 per ton.

Q. Making a difference of how much between the net price realized per ton from the sugar produced from the burned area which was marketed in the latter part of 1912 and the net price per ton realized from the sugar from the unburned area, marketed in 1913?

A. A difference of \$2.67 per ton.

Q. Now what does this \$2.67 per ton represent?

A. Represents that we got more for the burned cane per ton than we did for the unburned.

Q. On account—

A. On account of the higher price prevailing in 1912, to what it was in 1913.

A. According to the testimony that has been introduced, the area of that portion of the field which was burned was 86.2 acres? A. Yes.

Q. How much then was the yield per acre, the total yield for the burned area being 238 tons?

A. 2.76 per acre.

Q. According to the testimony the yield from the balance of the field which was unburned, namely, 7.89 acres was 4.72 tons per acre of sugar?

A. Yes.

Q. Assuming then, Mr. Mason, that the total area of this field had gone to maturity and had been harvested in the ordinary course of events, without

(Testimony of Arthur Mason.)

any fire sweeping through it, and that the yield for the total area would have been the same per acre as that portion which was unburned, namely, 4.72 tons pre acre, the loss then, from the burned area would be how many tons per acre? [290—263]

A. 1.96.

Q. Or how many tons? A. 168.95.

Q. You have testified that the net price realized from the unburned area was \$60.72 per ton, if then the total yield of sugar, if gone to maturity would have shown 4.72 tons of sugar to the acre, and the loss by reason of a part having been burned being 1.98 tons of sugar to the acre, or 168.95 what then would that, if carried out by mathematical calculation show as a loss on account of the burned area?

A. Shows a loss of \$10,258.64.

Q. You have testified that on account of the higher price prevailing in the latter part of 1912 over that prevailing when the sugar would have been sold in the ordinary course of events, makes a gain of \$635.46, that then would have to be subtracted then from the loss just testified to, in order to show the net loss? A. Yes.

Q. What would that net loss be? A. \$9,623.18.

Q. Have you calculated the actual cost of harvesting and milling the burned cane? A. I have.

Q. Let us go over the entire list.

(Testimony of Arthur Mason.)

A. The items consist of the following sums:

\$ 15.50

1,928.82

334.05

208.50

32.

30.80

31.50

---

\$2,581.17 [291—264]

Q. Was there any error in your testimony yesterday, any error made in that list? A. Yes.

Q. What was the error?

A. The error, I included the sum of \$28.49, the charge for shipping sugar should not have been brought into this account.

Q. Now going to the milling account?

A. The same as yesterday, there is no error in that.

Q. Let us have the items?

A.

\$5.40

773.72

172.30

13.

608.70

---

\$1,573.12

Q. Then the total cost of harvesting and milling would be the aggregate amount of those two items?



(Testimony of Arthur Mason.)

A. Yes, the harvesting, \$2,581.17, and the milling 1,573.12; total, \$4,154.29.

Q. Now, can you state, Mr. Mason, what the average cost for harvesting on the Halawa Plantation was for the year 1912? A. Yes.

Q. How much per ton? A. \$8.42 per ton.

Q. Have you figured the average cost for this burned crop? A. The cost?

Q. The total harvesting cost was 2,581.17, now the cost per ton? A. \$10.84.

Q. Making a difference in the cost per ton—

A. \$2.42 per ton. [292—265]

Q. That being the extra cost of harvesting the 238 tons? A. Yes.

Q. Making a total extra cost of harvesting of how much? A. \$575.96.

Q. Now what was the average cost of milling to the Halawa Plantation upon the 200 tons milled at Halawa? A. \$7.86 per ton.

Q. What was the average cost of milling the 1912 crop at Halawa? A. \$5.52.

Q. Making an extra cost for the burned crop of how much per ton? A. \$2.34, or a total of \$468.

Q. Then if the net loss on account of the burning of the cane, aside from the extra cost of harvesting and milling was \$9,623.18, as you have testified, what additional loss was there on account of this extra cost of harvesting and milling?

A. That would show a total net loss of \$10,667.14 on the basis of 4.72 tons per acre.

Mr. OLSON.—At this time, under stipulation al-

(Testimony of Arthur Mason.)

ready made with counsel for the county, it is agreed for the purposes of this case that in case of a verdict for the plaintiff, that in estimating the damages to which the plaintiff will be entitled, there shall be deducted from the total figure the sum of \$400 in favor of the county on account of the saving in the rental on the land from the time that the crop was burned on the burned area until the time when the crop would have gone off in the ordinary course of events, and also on account of the increased taxation which would have resulted if the crop had not been burned. That is correct, is it Mr. Heen?

Mr. HEEN.—Yes. [293—266]

Q. The figure you have given us as representing the net loss to the plantation on the basis of an estimated yield of 4.72 tons to the acre for the entire area, assuming that to have been the yield throughout, the figure you gave us as the net loss, \$10,667.14, deducting the amount stipulated, which should be deducted on account of the rental value of the land and taxes, \$400, that would leave the total net loss of what, on that basis? A. \$10,267.14.

Q. Assuming that the yield for the burned area instead of being 4.72 tons to the acre had been 5½ tons to the acre, in order to cover certain testimony in the record, I will ask you if you have made the calculation to as to show what the net loss, aside from this deduction for taxes and rents, would have been on account of the burned cane? A. Yes.

Q. Please state what that would be?

(Testimony of Arthur Mason.)

A. On the basis of  $5\frac{1}{2}$  tons to the acre for 86.2 acres, taking the price of \$60.72—

Q. That being the price which would have been realized if marketed with the sugar from the unburned area?

A. What would be realized was \$28,787.35, from which we deduct the amount actually received from the burned area, namely, \$15,086.49.

Q. Leaving a balance of?

A. Of \$13,700.86, to which must be added the extra cost of harvesting and milling, amounting to \$1,043.96, making a total net loss of \$14,744.82.

Q. The deduction was \$1,043.96 for harvesting and milling? A. Yes. [294—267]

Q. That would then represent the net loss to the plaintiff on the assumption that the burned area, if it had gone to maturity would have yielded  $5\frac{1}{2}$  tons to the acre? A. Yes.

Q. Deducting then this same amount which has been agreed should be deducted on account of rents and taxes with which the plantation would have been charged, namely \$400, would leave the total grand net loss of how much? A. \$14,344.82.

Q. Assuming now, Mr. Mason, that the yield of the burned area, if it had not been burned and had gone to maturity and harvested in the ordinary course of events, would be 6 tons to the acre, I will ask you if you have made the same calculation in order that we may ascertain what the loss suffered would be on that basis? A. I have.

(Testimony of Arthur Mason.)

Q. Please give us those figures?

A. On the basis of 6 tons to the acre for 86.2 acres at the price of \$60.72 per ton—

Q. Being the price it would have brought if it had gone to maturity and been harvested and marketed in due course?

A. Yes. The amount would be \$31,404.38, from which we deduct as before the amount received for the burned area, namely, \$15,086.49, leaving a balance of \$16,317.89, to which we add the extra cost of milling and harvesting amounting to \$1,043.96, making a total net loss of \$17,361.85.

Q. Now Mr. Mason, under stipulation we must deduct from that amount the amount agreed upon as representing the charge which would be made to the plaintiff on account of the increase in taxes and the rental of the land, namely, \$400, leaving how much?  
[295—268]

A. \$16,961.85.

Q. I think you have already testified that according to the accounts the shipment of the sugar from the unburned area, at which time the sugar would have been shipped from the remaining portion of the field, if it had gone to maturity and harvested in due course, the shipment was made July 11th, 1913? A. Yes.

Q. And the price paid on the 13th day of August, was it the 13? A. Yes, approximately.

Q. The 13th day of August, 1913?

A. Yes. No, the 7th day of August.



(Testimony of Arthur Mason.)

Q. It would be the 7th of August instead of the 13th?     A. Yes.

Q. What was the basis, the market price which formed the basis for that sale?     A. \$3.715.

Q. That is \$3,715 per 100 pounds?     A. Yes.

That is all     [296—269]

Cross-examination of Mr. MASON.

Q. At the rate of \$3,715, did you get the price at that rate, or was there any deduction made from that rate?     A. Yes.

Q. What deduction?

A. Deduction of a quarter of a cent.

Q. What then was the net rate?

A. I couldn't give the net amount we obtained, sugar is further affected by the polarization, sometime a little above, sometime a little below, the actual net amount we received for that sugar was \$3,481 or \$69.62 per ton.

Q. The net rate after deducting a quarter of a cent would have been \$3,465, then you mean there was added to that a certain amount due to polarization?

A. The difference was due to the polarization.

Q. What was your costs on that shipment which was made in the month of July, 1913?

A. I have worked it out per ton, the charges on that shipment amounted to \$7.828 per ton.

Q. Then after deducting \$7,828 from \$69.62 you have then a net rate of?

A. The balance will be \$61.79.

(Testimony of Arthur Mason.)

Q. Then after that you made allowance for shrinkage?

A. \$61.79 represents the payment for the actual sugar, the weight of the sugar in San Francisco.

Q. How did you get your rate of \$60.72 per ton?

A. We shipped in that shipment 4,786 bags of sugar, each bag containing 125 pounds, that made 299 tons and 125 pounds of sugar which actually left the mill. [297—270]

Q. This 299 tons included sugar from the unburned area?

A. Yes, we actually received for that shipment of 299 odd tons \$18,164.05, which gives an average of \$60.72 per ton, sugar which left the mill.

Q. As weighed at the mill?

A. Weighed at the mill.

Q. The difference then between \$60.72 and \$61.79 was due to some shrinkage?

A. The difference is the shrinkage.

Q. What would you take into consideration as being the costs of marketing and transportation?

A. The actual costs.

Q. What were they, I mean the items, what were the items making up the costs of marketing and transporting?

A. Railroad freight to Mahukona.

Q. Railroad freight from the mill to Mahukona?

A. From the mill station from Halawa; the ocean freight, marine insurance, analysis, charge for weighing and delivering and the commissions.

Q. On the 200 tons from the burned area, what was

(Testimony of Arthur Mason.)

the market price for that burned area?      A. \$3.98.

Q. On what date was that?

A. Approximately the 12th of December, based on the price for the 12th of December.

Q. \$3.98?      A. Yes.

Q. You deducted then from \$3.98, 25¢?

A. From the 200 tons.

Q. That is the New York price?

A. Yes. [298—271]

Q. And San Francisco is \$5. a ton lower, or 25¢ per 100 pounds lower?      A. Yes.

Q. Then I have here the net rate per ton showing \$74—

A. No, you have to deduct from that on account of the low polarization.

Q. Before taking the polarization into consideration?

A. Before taking the polarization into consideration.

Q. That would be \$74.60?

A. No doubt you are correct.

Q. Before taking into consideration the polarization—

A. There were two grades of sugar in that shipment of burned cane, the A price given was \$3.599 and the B sugar \$3.305.

Q. How many tons of A sugar was there in that shipment?

A. 3,113 bags of A and 87 bags of B sugar.

Q. That is the quantity from the burned area?

A. Yes.

(Testimony of Arthur Mason.)

Q. Was there included in that some other sugar?

A. No, only sugar from the burned area.

Q. 238 Tons?

A. The 38 tons were ground at Niuluii and Union Mill and is not in the account sales, that was received by Union Mill and Niulii and paid us.

Q. How did you arrive at your rate per ton on sugar on that shipment of 238 tons?

A. By taking first of all the net amount of the account sales for the 200 tons, amounting to \$12,633.83, the amount received from Niulii \$2000, and Union Mill, \$452.66, making a total of \$15,086.49, and dividing that by 238.

Q. How much did you receive, gross on the 200 tons? [299—272]

A. We do not receive the gross, the account sales show the gross receipts were \$14,226.03.

Q. And you deduct from that?

A. Charges for railroad freight, ocean freight, marine insurance, analysis, weighing and delivering and commission, amounting to a total of \$1,592.20, leaving a balance of \$12,633.83, the net received.

Q. The *said the* gross receipts, were what?

A. \$14,226.03.

Q. Now, assuming that the burned area of cane, if it had reached maturity and had been harvested in due course, had produced five tons of sugar per acre?

A. I haven't worked that out, I will if you wish it.

Q. Yes, if you please. Then Mr. Mason, the total output would be 86.2 times 5 tons, wouldn't it?

A. Yes.



(Testimony of Arthur Mason.)

Q. Did you get the result?

A. That would have produced \$26,160.32, from which there is to be deducted \$15,086.49, the amount received for the burned cane.

Q. Isn't it \$26,170.32?

A. Yes, \$26,170.32, from which there is to be deducted \$15,086.49, received for the burned cane, would leave \$11,083.83, adding the extra cost for harvesting and milling, \$1,043.96, produces a net loss of \$12,127.79, deducting the \$400, would leave a net balance of \$11,727.79.

Q. What were the items included in your calculation as to the cost of harvesting the burned cane? What were the different items? [300—273]

A. Items already given you.

Q. Are these figures the same as those given yesterday?

A. Exactly the same except that I have withdrawn the item for railroad freight.

Q. You have withdrawn that and charged it up—

A. Not charged against you at all.

Q. Charged it to marketing?

A. Marketing doesn't arise upon these figures, not that portion of it.

Q. On what items did you figure in order to obtain the average cost of harvesting in 1912?

A. On the same items as these, the actual costs.

Q. Any other extra items, or each item corresponded one with the other?

A. All the items such as cutting, loading, fluming for the entire area, and milling. All the general

(Testimony of Arthur Mason.)

items composing the cost of harvesting the crop.

Q. Fluming is much cheaper than transporting by other methods, is that correct?     A. Yes.

Q. Assuming that all the transportation had been done by truck, hauling by mules, and assuming that there was no fluming in the year 1912, that would raise the average cost of harvesting, would it not?

A. Of course it would.

Q. There was no fluming of this cane from the burned area, was there?

A. No. There was *most* hauling in the year 1912 than by fluming or otherwise. [301—274]

Q. Was the transportation in 1912 done by fluming or otherwise?

A. I can tell by referring to the books. No, the cost of hauling in 1912 was much greater, not much fluming done.

Q. What is the difference in the entire crop?

A. The entire crop flumed during 1912 was \$1,-127.80 while the cost of hauling was \$3,469.87.

Q. What is the difference in the cost between the two methods?

A. It varies, it depends in both methods whether the cane is near the mill or far away from it.

Q. Can you give us a general average?

A. No, I couldn't.

Q. Is it, say, 10% or 20% lower?

A. I decline to commit myself to that because I don't know.

Q. Did you base your costs of harvesting for the year 1912 on the amount paid out to laborers and the

(Testimony of Arthur Mason.)

cost of feeding the mules, etc.?      A. I have.

Q. Were the prices the same in 1912 as the prices for 1913, at the time the burned cane was harvested, the prices of the different items that went into the cost of harvesting, were they the same, have you compared them?

A. The same items make up the cost for 1913.

Q. I am not referring to that, I am referring to the different items, the cost of labor, for instance, were they the same in 1912 as they were in 1913?

A. The cost of labor was the same.

Q. The labor was correspondingly the same?

A. Yes.      [302—275]

Q. Have you compiled the average cost for 1911?

A. No, I have compiled them, but I haven't got them with me.

Q. Were they higher or lower than the 1912 costs?

A. I don't think I have anything with me to show that. No, I have nothing with me to give you those figures.

Q. Was there any rise in the cost of feed in 1912, towards the end of the year, mule feed or horse feed?

A. From what period?

Q. The latter part of October?

A. It was just about the same for the entire year, practically no difference.

That is all.      [303—276]

*In the Circuit Court of the Third Judicial Circuit,  
Territory of Hawaii.*

October, A. D. 1914 Term.

HALAWA PLANTATION, LIMITED,

vs.

COUNTY OF HAWAII.

**Court's Charge to the Jury.**

**GENTLEMEN OF THE JURY:**

You are familiar with the issues in this case, upon which the trial has proceeded, also the evidence offered at the trial. It is now my duty to inform you as to the law applicable to the issues and to the evidence.

I instruct you that a master or employer is liable to third persons injured by negligent acts done by his servants or servant in the course of their employment, although the master or employer did not authorize or know of the servants' act or neglect. In this case the evidence is undisputed that the persons or person who lighted the fire on the public road adjoining the premises of the plaintiff, were or was at the time, the servants or servant of the defendant, the County of Hawaii. You are instructed that the defendant is, as a matter of law, liable for any injury such as is claimed to have been caused to the property of the plaintiff through such negligence of its servants or servant, if you find that such negligence existed.

By negligence is meant the failure to observe ordinary care, or a failure to observe such care and pru-



dence as a person of ordinary care usually exercises under the same or similar circumstances.

I instruct you that if, after considering all of the evidence, you should believe that the servants or servant of the defendant the County of Hawaii, in lighting the fire on the public road adjoining the premises of the plaintiff, while in the course of their employment, failed to observe ordinary care and prudence, and that by reason of such failure, the fire so lighted spread to the premises of the plaintiff, and [304—277] injured the property of the plaintiff, and that thereby the plaintiff suffered pecuniary loss or damage, your verdict should be for the plaintiff.

You are further instructed that, if, after considering all of the evidence you should believe that the servants or servant of the defendant, in the course of their employment, lighted a fire on the public road adjoining the premises of the plaintiff and failed to observe ordinary care and prudence to prevent the said fire from extending to the said premises, and that by reason of such failure, said fire spread to the premises of the plaintiff and injured the property of the plaintiff, and that thereby the plaintiff suffered pecuniary loss or damage, your verdict should be for the plaintiff.

You are instructed, that, although you may believe from the evidence that the injury complained of was occasioned by the acts of the employees or servants of the defendant, still, if you further believe from the evidence, that such injury was not the natural result of the acts of the said employees or

servants of the defendant and could not have been foreseen or reasonably expected to result from the conduct of the said employees or servants of the defendant, then the defendant would not be liable.

You are instructed that if the injury complained of was caused by an extraordinary wind, which could not be foreseen and provided against—in other words, was what at law is termed an act of God, and such act was the sole cause of the injury—then the proof of the fact would be a perfect shield, and the plaintiff may not recover.

The Court instructs you that you are not bound to accept as true the opinions of the witnesses who have testified as experts in this case, but you may give said opinions and each of them such weight as you may deem them entitled to, or altogether [305—278] disregard such opinions in so far as you, from all of the facts and circumstances in the evidence, may believe such opinions unreasonable.

You are instructed that the burden of proving negligence rests upon the party alleging it; and where a person charges negligence on the part of another as a cause of action, he must prove the negligence by a preponderance of the evidence. And in this case, if you find that the weight of the evidence is in favor of the defendant or that it is equally balanced, then the plaintiff cannot recover, and you should find the issues for the defendant.

You are instructed that the preponderance of evidence does not depend upon the number of witnesses and does not mean the greater number of witnesses. It depends upon the weight of evidence and means

the greater weight of the evidence.

In this case the property which is claimed by the plaintiff to have been injured was an unharvested crop of sugar cane. If you find for the plaintiff, the measure of damages to which the plaintiff is entitled is such an amount of money as will compensate the plaintiff for the loss sustained, that is to say, upon the basis of the market value of the crop at the time of the injury. In order to arrive at this loss or damage, you should determine the amount which the plaintiff would reasonably be expected to have realized therefrom if it had gone to maturity and been harvested and the product therefrom marketed in the ordinary course of business, less the normal cost of harvesting, milling and marketing the same. From this amount should be deducted the amount received by the plaintiff from the sugar manufactured from the injured crop, less the actual cost of harvesting, milling and [306—279] marketing the same, and there should also be deducted the sum of Four Hundred Dollars, which has been agreed upon between the parties in this case as a proper allowance in favor of the defendant on account of the saving in taxes and rental value of the land during the remaining period which would have elapsed while the crop thereon would have been left unharvested in the ordinary course of business.

As you retire to consider your verdict, the clerk will hand you two blank forms of verdict, one of which you will sign and return in case you find for the plaintiff, filling in the amount of damages which you may agree upon, and the other you will sign

and return in the event you find for the defendant.

Mr. Clerk, swear D. M. Kilinahe as bailiff for this jury.

Gentlemen of the Jury, you may now retire to consider your verdict.

---

Judge. [307—280]

**[Certificate of Reporter to Transcript of Testimony,  
etc.]**

HALAWA PLANTATION, LIMITED,

vs.

THE COUNTY OF HAWAII.

Territory of Hawaii,

County of Hawaii,

Third Judicial Circuit,—ss.

I, H. L. Kinslea, Official Reporter for the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, do hereby certify that the foregoing document consisting of two volumes marked Part 1 and Part 2 respectively and together containing 281 pages, is a true, full and correct transcript of my stenographic notes in the case of Halawa Plantation, Limited, a Corporation, versus the County of Hawaii, and tried in the said Circuit Court at its October, A. D. 1914, term.

(Signed) H. L. KINSLEA,  
Official Reporter.

[Endorsed]: Circuit Court, Third Circuit, Territory of Hawaii. Halawa Plantation, Limited, Plaintiff, vs. County of Hawaii, Defendant. Transcript of Evidence. Part 2. Circuit Court, Third



Circuit. Filed April 23d, 1915, 10:50 o'clock A. M.  
E. M. Muller, Clerk. No. 846. Received and Filed  
in the Supreme Court, May 11, 1915, at 9:50 A. M.  
J. A. Thompson, Clerk. [308]

---

**[Instructions Requested by Defendant.]**

Instruction No. 5.

The Court instructs you, Gentlemen of the Jury, that even if you find from the evidence that the road laborers employed by the defendant negligently started the original fire on the roadside at Aamakao, on the morning of October the 18th, 1912, as alleged in the plaintiff's complaint, or even that said laborers thereafter negligently managed said fire after it was started, still, if you also find that the space between where the fire was started and the cane field was a grove of lauhala trees, and that upon the ground under the said trees was an accumulation of dry lauhala leaves and other dry leaves, dry grass and other dry vegetation, and if you find that such dry materials were inflammable and that the same made an unbroken train of dry inflammable materials and that the same acted as an effective fire carrier from the place where the fire was started to where it entered the cane field;

And if you find that there was nothing else that could have acted as a fire carrier from the place where the fire was started to the cane field, and that but for said accumulation of dry materials the said fire could not have reached the cane field of the plaintiff;

And if you also find from the evidence that all the land included in the path of the fire from its starting point to the cane field was also part of the land of Aamakao held under lease by the plaintiff, in its possession and under the control of its manager and servants;

And if you also find that the manager of the plantation of the plaintiff, for a long period prior to the date of October 18th, 1912, had knowledge of all conditions of wind and [309] weather existing in the District of North Kohala, and more especially at Aamakao, and had knowledge of the conditions as to the accumulation of dry materials in that part of the plaintiff's land, lying between the Government road and the east boundary of its cane field and more especially the part thereof in the path over which the fire traveled from the place where it was started, to the cane field;

And if you also find that with such knowledge, the manager or servants of the plaintiff neglected to do any acts to destroy the effectiveness of said accumulation of dry materials as a fire carrier, either by burning the same by a back-fire, or clearing away a space sufficient in width to stop any fire originating from any source on the windward side of the said cane field;

And if you believe that to destroy in some way the effectiveness of the dry materials as a fire carrier, to prevent any fire originating from any source, was such an act as any reasonably prudent person would have done, and that if such had been done, that then the fire could not have reached the cane field, then I

further instruct you that the neglect of the manager or servants of the plaintiff to destroy in some way the effectiveness of said dry materials as a fire carrier was contributory negligence and is, therefore, a bar to recovery of damages by the plaintiff, and that your verdict must be for the defendant. [310]

Instruction No. 6.

You are instructed that contributory negligence is such negligence on the part of the plaintiff as helped to produce the injuries complained of, and if you find from a preponderance of all the evidence in this case that the plaintiff was guilty of any negligence that helped to bring about or produce the injury complained of, then in that case, the plaintiff cannot recover in this action.

Sec. 1351, Sackett on Instructions. [311]

Instruction No. 7.

You are instructed that the law places upon all persons the duty of exercising reasonable care to avoid injury, and even though you should believe from the evidence that the employees and servants of the defendant were negligent and that the property of the plaintiff was injured thereby, still if the evidence also shows that the injury would have been avoided by the exercise of ordinary care by the plaintiff or its manager or servants, and that the said plaintiff or its manager or servants did not exercise such care, then you should find for the defendant.

Sec. 1352, Sackett on Instructions. [312]

*In the Circuit Court of the Third Circuit, Territory  
of Hawaii.*

October, 1914, Term.

HALAWA PLANTATION, LIMITED,  
Plaintiff,

vs.

COUNTY OF HAWAII,  
Defendant.

**Verdict [in Circuit Court].**

**ACTION FOR DAMAGES.**

WE, THE JURY, in the above-entitled cause hereby give judgment in favor of the plaintiff and against the defendant for the sum of \$11,727.79.

(Signed) W. D. ACKERMAN,  
Foreman.

Dated Kailua, Hawaii, T. H., November 25, 1914.

[Endorsed]: Circuit Court, Third Circuit, Territory of Hawaii. October, 1914, Term. Halawa Plantation, Limited, vs. County of Hawaii. Verdict. Circuit Court, Third Circuit. Filed November 25th, 1914, 6:05 o'clock P. M. (Signed) E. M. Muller, Clerk.

(Received and filed in the Supreme Court, May 11, 1915.) [313]



*In the Circuit Court of the Third Judicial Circuit,  
Territory of Hawaii.*

October, 1914, Term.

HALAWA PLANTATION, LIMITED,

Plaintiff,

vs.

COUNTY OF HAWAII.

**Motion for New Trial [in Circuit Court].**

COMES NOW the County of Hawaii and hereby moves for a new trial of the above-entitled cause upon the following grounds:

1. That the verdict rendered by the jury is contrary to the law.
2. That the said verdict is contrary to the evidence.
3. That the said verdict is contrary to the weight of the evidence.

COUNTY OF HAWAII.

(Signed) Per WM. H. HEEN,  
Deputy County Attorney.

[Endorsed]: In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii. Halawa Plantation, Limited, vs. The County of Hawaii. Motion for New Trial. Circuit Court, Third Circuit. Filed November 25th, 1914, 6:15 o'clock P. M. (Signed) E. M. Muller, Clerk.

(Received and filed in the Supreme Court, May 11, 1915.) [314]

Mr. Heen thereupon makes, presents and files a

motion for new trial.

The Court denies the motion.

Mr. Heen excepts to the ruling of the Court.

[315]

---

*In the Circuit Court of the Third Judicial Circuit,  
Territory of Hawaii.*

October Term, 1914.

HALAWA PLANTATION, LIMITED, a Corpora-  
tion,

Plaintiff,

vs.

COUNTY OF HAWAII,

Defendant.

**Judgment [in Circuit Court].**

This action by petition claiming damages, came to the October, 1913, term, and thence by continuance to the present term when the parties appeared and were at issue, to the jury;

Said cause having been heard and committed to the jury, they find for the plaintiff to recover Eleven Thousand Seven Hundred Twenty-seven and 79/100 Dollars (\$11,727.79) damages;

THEREFORE, IT IS ADJUDGED that the plaintiff recover of the defendant Eleven Thousand Seven Hundred Twenty-seven and 79/100 Dollars (\$11,727.79) damages, together with interest thereon at the legal rate of six per cent (6%) per annum from the date hereof.

BY THE COURT:

(Signed) E. M. MULLER,

Clerk.

Entered this 3d day of December, 1914, as of the October term, 1914.

[Endorsed]: Circuit Court, Third Circuit, Territory of Hawaii. October Term, 1914. Halawa Plantation, Limited, Plaintiff, vs. County of Hawaii, Defendant. Judgment for Plaintiff. Circuit Court, Third Circuit. Filed December 3d, 1914, 1:30 P. M. (Signed) E. M. Muller, Clerk.

(Received and filed in the Supreme Court, May 11, 1915.) [316]

---

**[Opinion of Supreme Court, Territory of Hawaii.]**

*In the Supreme Court of the Territory of Hawaii.*

October Term, 1914.

HALAWA PLANTATION, LIMITED, a Corporation,

vs.

COUNTY OF HAWAII,

Error to Circuit Court, Third Circuit.

Hon. J. A. MATTHEWMAN, Judge.

Submitted July 26, 1915.

Decided September 24, 1915.

ROBERTSON, C. J., WATSON AND  
QUARLES, JJ.

Counties—Negligence of Employees—Demurrer.—A demurrer to a complaint alleging facts showing an injury to private property resulting directly from the negligence of road employees of a county acting within the scope of their employment is properly overruled. Following deci-

sions in *Matsumura v. County of Hawaii*, 19 Haw. 18 and 496.

**Dismissal and Nonsuit—Dilatory Motion.**—A motion for nonsuit made after the defendant has introduced evidence in support of his defense comes too late and should be denied on that ground.

**Damages—Contributory Negligence.**—In an action for damages on account of injury to a growing crop of cane caused by a fire negligently started by defendant's servants on a highway near the plaintiff's cane fields the fact that the plaintiff, who had no notice that the fire was to be started, had permitted dead grass and dry leaves [317] to remain on the space between such highway and cane fields would not permit a finding by the jury of contributory negligence on the part of the plaintiff. The requested instruction submitting the question of contributory negligence was properly refused. [318]

#### OPINION OF THE COURT BY QUARLES, J.

The plaintiff commenced this action to recover from the defendant county damages for loss and injury to a growing crop of cane caused by fire alleged to have been negligently started by road employees regularly employed and authorized to repair a road near the property of the plaintiff by the defendant. To the complaint the defendant demurred upon the grounds that the complaint did not state facts sufficient to constitute a cause of action; that the defendant, being a body corporate and politic, is not liable for the alleged negligent acts; that repairing roads is a governmental function, and that defendant is



not liable in the exercise thereof for wrongful or negligent acts of its servants or employees; that there is no statute under which defendant can be held liable. The plaintiff joined in the demurrer which was overruled by the Court. The defendant's answer is a general denial. The cause was tried before the court and a jury. At the close of the evidence the defendant moved for a nonsuit, which was denied. The defendant then moved for a peremptory instruction to find for the defendant, which motion was also denied. The jury returned a verdict in favor of the plaintiff upon which judgment was regularly entered. The defendant moved for a new trial on the ground that the verdict is contrary to law, contrary to the evidence and contrary to the weight of the evidence, which motion for a new trial was denied. The cause comes here upon writ of error. We summarize the assigned errors as follows: The Court erred (1) in overruling the demurrer; (2) in overruling the motion for nonsuit; (3) in overruling defendant's motion for a directed verdict; (4) in giving plaintiff's requests for instructions Nos. 1, 2, 3, 5, 6 and 7; (5) in failing to instruct the jury upon the question of contributory negligence, and (6) in overruling defendant's motion for a new trial. [319]

1. The demurrer was properly overruled. The complaint alleged probative facts showing that the road employees of the defendant, acting within the scope of their employment, negligently started a fire on a highway near the cane fields of plaintiff; that the space between the point where the fire was started and such cane fields was covered with inflam-

mable material—dry grass and lauhala leaves—and that the fire spread to said cane fields and destroyed a large amount of cane to the injury and damage of the plaintiff. The facts alleged show negligence on the part of the servants of the defendant and that such negligence was the proximate cause of the injury alleged. The liability of the defendant county for such negligence is settled in this jurisdiction by the decisions in *Matsumura v. County of Hawaii*, 19 Haw. 18 and 496. We are inclined to believe that we would hold otherwise if this was a case of first impression, but the rule that a county is liable for the injury to private property caused by the negligent acts of its road employees, acting within the scope of their employment, having been announced in the first decision in the *Matsumura* case (19 Haw. 18), and reaffirmed in the same case in the later decision (19 Haw. 496), and the legislature having met in four regular sessions since the announcement of such rule without enacting any statute adopting a different rule, we must consider that the legislature has acquiesced in the rule announced.

2. The motion for a nonsuit was properly overruled on the ground that it was made after the defendant had introduced evidence in support of its defense, and came too late. Said motion was based upon the same grounds stated in defendant's demurrer to the complaint.

3. The defendant's motion for a directed verdict was based principally upon the ground that the defendant as a body [320] corporate and politic is not liable for the negligent acts of its employees, act-

ing within the scope of their employment, and was properly denied for the reasons heretofore given for overruling the demurrer.

4. We have carefully examined the instructions given by the Court at the request of the plaintiff, complained of, in connection with the entire charge of the Court to the jury, and find no error therein. Defendant's objection to the said instructions is based principally upon the ground that the defendant, being a body corporate and politic, is not liable to plaintiff for the negligent acts of defendant's road employees, which position is untenable.

5. The defendant requested the Court to instruct the jury upon the question of contributory negligence to the effect that although the jury should find that the injury to the plaintiff was caused by certain specified acts of negligence of the employees of the defendant, yet, if the jury should find from the evidence that the plaintiff was negligent in permitting the space intervening between the road where the fire was started and the cane fields of the plaintiff to remain covered with dead grass and leaves from lauhala trees there growing, that this was contributory negligence on the part of the plaintiff and that the verdict should be for the defendant. This request was properly denied. It involved the proposition that it was the duty of the plaintiff to keep a space outside of its cultivated fields clear of inflammable material, and failing to do so could not recover for damages sustained by the negligence of defendant's road employees in starting a fire on the road contiguous to such inflammable material. It is apparent



that the fire was not started by accident, but intentionally and for the convenience of defendant's servants. The authorities cited by the defendant in support of the aforesaid proposition are cases where fires have been started from sparks [321] emitted by steam engines running upon railways. We do not consider those authorities applicable to the case at bar for the reason that in such cases the adjoining owner has knowledge that fires are liable to occur from accident by the emission of sparks from steam engines daily traveling along the railway and he should take the precaution to keep inflammable material off of his own premises within the known danger zone. Here no such known danger existed and the plaintiff had no reason to apprehend danger to its property from fires likely to be started by accident, and the injury that it sustained was not caused by fire started by accident. The law does not require anyone to take precautions against unknown intentional wrongful acts of another, nor make it his duty to presume that another will intentionally do a wrongful act that will result in injury to his property. If the failure of the plaintiff to keep the intervening space between the highway and its fields clear of leaves and dead grass is contributory negligence it is such by reason of some rule of law imposing this duty upon it, in which event such failure might be held, as matter of law, to have contributed to the injury sustained. The requested instruction was based upon the presumed existence of such rule of law, but we know of no authority to sustain it under circumstances like those shown to have existed.



in the present case. We are therefore unable to hold that the Court erred in refusing to give the requested instruction, and hold that the same was properly refused.

6. The motion for a new trial was based upon the same theory and grounds as were the demurrer to the complaint and the motion for a directed verdict in favor of the defendant, and, for the reasons hereinabove given, was properly denied. None of the assignments of error are sustained. [322]

We desire to call the attention of counsel and of the clerks of the Circuit Courts to the condition of the record in this case, and do so for the reason that we find a growing laxity in the preparation of records on appeal to this court. There is in the record here much that should be left out, the presence of which is inconvenient to this court. For instance, there is a lengthy brief in the record which was presented to the trial Court upon the hearing of the demurrer, which has no more place in the record here than would a stenographic report of the arguments of counsel. We find a copy of a motion to set the case for trial, together with the cover and all endorsements thereon, in the record. There are literal copies of five subpoenas, one of them *duces tecum* consisting of three pages, with the covers and return of the officer serving same, the five covering twenty-one pages and swelling the transcript beyond that it should be in size. To each of these unnecessary documents the clerk has appended a formal certificate of its correctness as a copy, and has appended such certificate to each pleading, mo-

tion, the verdict, judgment, etc., so that we find in the record nineteen certificates by the clerk authenticating copies, whereas one at the end of the transcript authenticating them, naming each in the order in which it is found in the record, would be sufficient and make the record shorter and more convenient.

The trial court did not endorse on the requests for instructions handed in by the respective parties, those given and those refused, nor did it show which were given in part and refused in part, or the modifications of any given, as required by Sec. 2439, R. L., which statute seems to have been ignored in this case. The only way in which this court is enabled to ascertain whether a requested instruction was given or not is by comparing it with the charge given by the Court and then examining [323] the clerk's minutes to see whether such request was presented and whether given or refused. Compliance with the statute referred to would have saved this Court considerable labor and inconvenience.

The judgment is affirmed.

W. H. HEEN,

Deputy County Attorney of Hawaii, for Plaintiff in Error.

HOLMES, STANLEY & OLSON,

For Defendant in Error.

(Signed) A. G. N. ROBERTSON.

(Signed) E. M. WATSON.

(Signed) RALPH P. QUARLES.

[Endorsed]: No. 846. Supreme Court, Territory of Hawaii. October Term, 1914. Halawa Planta-

tion, Limited, a Corporation, vs. County of Hawaii.  
Opinion. Filed September 24, 1915, at 1:12 P. M.  
J. A. Thompson, Clerk. [324]

---

*In the Supreme Court of the Territory of Hawaii.*

October Term, 1914.

WRIT OF ERROR.

HALAWA PLANTATION, LIMITED, a Corpora-  
tion,

Plaintiff—Defendant in Error,  
vs.

COUNTY OF HAWAII,

Defendant—Plaintiff in Error.

**Judgment [in Supreme Court, Territory of Hawaii].**

In the above-entitled cause, pursuant to the opinion of the above-entitled Court filed therein on September 24th, 1915, the judgment of the Circuit Court of the Third Judicial Circuit is affirmed.

Dated, Honolulu, T. H., September 27, 1915.

BY THE COURT:

[Seal] (Signed) ROBERT PARKER, Jr.,  
Assistant Clerk.

[Endorsed]: No. 846. In the Supreme Court of the Territory of Hawaii. October Term, 1914. Halawa Plantation, Limited, a Corporation, Plaintiff—Defendant in Error, vs. County of Hawaii, Defendant—Plaintiff in Error. Judgment. Filed September 27, 1915, at 2:22 P. M. Robert Parker, Jr., Assistant Clerk. Stanley & Wilder, Kauikeolani Building, Honolulu, T. H. [325]

*In the Supreme Court of the Territory of Hawaii.*

— Term.

**ACTION IN DAMAGES.**

**HALAWA PLANTATION, LIMITED,**

Plaintiff and Defendant in Error,

vs.

**COUNTY OF HAWAII,**

Defendant and Plaintiff in Error.

**Petition for Writ of Error and Supersedeas**

**[Returnable in U. S. Circuit Court of Appeals].**

To the Honorable Supreme Court of the Territory of  
Hawaii:

The County of Hawaii, defendant and plaintiff in error, deeming itself aggrieved by the judgment of this Court, entered and filed on or about the 24th day of September, 1915, in the above-entitled cause, comes now by W. H. Beers, County Attorney for the County of Hawaii, and hereby humbly petitions this Court for an order allowing the said County of Hawaii to prosecute a writ of error and have the same allowed and issued from the United States Circuit Court of Appeals for the Ninth Circuit, to this Court under and according to the laws of the United States in that behalf made and provided and that the transcript of the record, proceedings and documentary exhibits upon which said judgment was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit [326] and also that an order may be made



by this Court fixing the amount of the bond which the said defendant shall give and furnish upon the said writ of error and upon the filing of such bond all proceedings relating to the subject matter in and of the said cause in this court and in the Circuit Court of the Third Judicial Circuit of the Territory of Hawaii, whether direct or ancillary thereto, be suspended and stayed until the determination of such writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit.

And in this behalf your petitioner shows that the said judgment was rendered in an action at law and that the amount involved, exclusive of costs, exceeds the value of Five Thousand (\$5,000) Dollars, the said value being Eleven Thousand Seven Hundred Twenty-seven and 79/100 (\$11,727.79) Dollars.

Dated at Hilo, Hawaii, this 30th day of October, 1915.

**COUNTY OF HAWAII.**

By W. H. BEERS,

County Attorney for the said County of Hawaii,

Petitioner.

County of Hawaii,

Territory of Hawaii,—ss.

**Affidavit of W. H. Beers.**

W. H. Beers, being first duly sworn, deposes and says: That he is the duly elected, qualified and acting county attorney of the County of Hawaii; that he has read the foregoing petition and knows the contents [327] thereof; that the matters and things therein set forth are true of his own knowledge; and

that the amount involved in the said cause, exclusive of costs, exceeds the value of Five Thousand (\$5,000) Dollars, the said value being Eleven Thousand Seven Hundred Twenty-seven and 79/100 (\$11,727.79) Dollars.

W. H. BEERS.

Subscribed and sworn to before me this 9th day of November, 1915.

[Seal]

E. M. MULLER,

Notary Public, Third Judicial Circuit, Territory of Hawaii.

[Endorsed]: No. 846. Filed December 14, 1915, at 10:38 A. M. J. A. Thompson, Clerk. [328]

---

*In the Supreme Court of the Territory of Hawaii.*

— Term.

**ACTION IN DAMAGES.**

**HALAWA PLANTATION, LIMITED,**

Plaintiff and Defendant in Error,

vs.

**COUNTY OF HAWAII,**

Defendant and Plaintiff in Error.

**Assignment of Errors [on Return to Writ of Error Returnable in U. S. Circuit Court of Appeals].**

Comes now the County of Hawaii, defendant and plaintiff in error, by W. H. Beers, county attorney of the County of Hawaii, and says that in the records and proceedings in the above-entitled cause in the Supreme Court of the Territory of Hawaii there are

manifest errors prejudicial to the said County of Hawaii, to wit:

#### FIRST ASSIGNMENT OF ERROR.

That the said Supreme Court in considering the error assigned upon a writ of error issued at the instance of the said County of Hawaii from the said Supreme Court to the Circuit Court of the Third Judicial Circuit of the Territory of Hawaii to correct certain rulings of the said Circuit Court in and upon the trial of the said cause erred in affirming the judgment of the said Circuit Court.

#### SECOND ASSIGNMENT OF ERROR.

That the said Supreme Court erred in holding that no error had been committed by the said Circuit Court in [329] overruling the demurrer interposed by the said County of Hawaii to the complaint of the said Halawa Plantation, Limited, which said demurrer reads as follows, to wit:

“Comes now the County of Hawaii, defendant above named, by W. H. Beers, its county attorney, and for demurrer to the complaint of the Halawa Plantation, Limited, plaintiff above named, heretofore filed herein, and to each and every count thereof alleges and says:

That the same does not state facts sufficient to constitute the cause of action against the said defendant;

2. That the said defendant, being a body corporate and politic, is not liable under the law for the alleged negligent and wrongful acts set forth in the said complaint;

3. That the function of repairing, maintaining, and constructing public streets, roads or highways, being a Governmental function, the said defendant is not liable under the law for any negligent or wrongful acts committed by its servants or employees in respect to the performance of the said function;

4. That there is no statute by which the said defendant may be held liable for the alleged and wrongful acts set forth in the said complaint;

5. That the said complaint is insufficient in that it fails to allege that the said plaintiff, a corporation, was authorized by its board of directors, to institute the above-entitled action against the said defendant.

Wherefore, by reason of the matters herein set forth, the said defendant prays judgment of this Court whether it should make any other or further answer unto the said complaint and that it may have its cost."

### THIRD ASSIGNMENT OF ERROR.

That the said Supreme Court erred in holding that no error had been committed by the said Circuit Court in refusing defendant's fifth requested instruction to the jury, in words as follows, to wit:

"The Court instructs you, gentlemen of the jury, that even if you find from the evidence that the road laborers employed by the defendant negligently started the original fire on the roadside at Aamakao, on the morning of October 18, 1912, as alleged in the plaintiff's com-



plaint, or even though said laborers thereafter negligently managed said fire after it was started, still if you also find that the space [330] between where the fire was started and the cane field was grove of lauhala trees, and that upon the ground under the said trees was an accumulation of dry lauhala leaves, and other dry leaves, dry grass and other dry vegetation, and if you find that such dry materials were inflammable, and that the same made an unbroken train of dry inflammable materials and that the same acted as an effective fire carrier from the place where the fire was started to where it entered the cane field;

And if you also find that there was nothing else that could have acted as a fire carrier from the place where the fire was started to the cane field, and that but for said accumulation of dry materials the said fire could not have reached the cane field of the plaintiff;

And if you also find from the evidence that all the land included in the path of the fire from its starting point to the cane field was also part of the land of Aamakao held under lease by the plaintiff, in its possession and under the control of its manager and servants;

And if you also find that the manager of the plantation of the plaintiff, for a long period prior to the date of October 18th, 1912, had knowledge of all conditions of wind and weather existing in the District of North Kohala, and

more especially at Aamakao, and had knowledge of the conditions as to accumulation of dry materials in that part of the plaintiff's land, lying between the Government road and the east boundary of its cane field and more especially the part thereof in the path over which the fire traveled from the place where it was started, to the cane field;

And if you also find that with such knowledge, the manager or servants of the plaintiff neglected to do any acts to destroy the effectiveness of said accumulation of dry materials as a fire carrier, either by burning the same by a back-fire, or clearing away a space sufficient in width to stop any fire originating from any source on the windward side of the said cane field;

And if you believe that to destroy in some way the effectiveness of the dry materials as a fire carrier to prevent any fire originating from any source was such an act as any reasonably prudent person would have done, and that if such had been done, that then the fire could not have reached the cane field, then I further instruct you that the neglect of the manager or servants of the plaintiff to destroy in some way the effectiveness of said dry materials as a fire carrier was contributory negligence and is, therefore, a bar to recovery of damages by the plaintiff, and that your verdict must be for the defendant." [331]

## FOURTH ASSIGNMENT OF ERROR.

That the said Supreme Court erred in holding and deciding that the said Circuit Court committed no error in refusing to give to the jury defendant's sixth requested instruction, in words as follows, to wit:

"You are instructed that contributory negligence is such negligence on the part of the plaintiff as helped to produce the injuries complained of, and if you find from a preponderance of all the evidence in this case that the plaintiff was guilty of any negligence that helped to bring about the injury complained of, then in that case, the plaintiff cannot recover in this action."

## FIFTH ASSIGNMENT OF ERROR.

That the said Supreme Court erred in holding and deciding that the said Circuit Court committed no error in refusing to give to the jury defendant's seventh requested instruction, in words as follows, to wit:

"You are instructed that the law places upon all persons the duty of exercising reasonable care to avoid injury, and even though you should believe from the evidence that the employees and servants of the defendant were negligent and that the property of the plaintiff was injured thereby, if the evidence also shows that the injury would have been avoided by the exercise of ordinary care by the plaintiff or its manager or servants, and that the said plaintiff or its manager or servants did not exercise such care, then you should find for the defendant."

Wherefore, the said County of Hawaii prays that the judgment of said Supreme Court of the Territory of Hawaii be reversed and that the said Supreme Court of the Territory of Hawaii be ordered to reverse the judgment theretofore entered in the said Circuit Court of the Third Judicial Circuit of the Territory of Hawaii and to order a new trial and that it be granted such other relief as may be proper [332] in the premises.

COUNTY OF HAWAII.

By W. H. BEERS,

County Attorney of the County of Hawaii.

[Endorsed:] No. 846. Filed December 14, 1915,  
at 10:38 A. M. J. A. Thompson, Clerk. [333]

---

*In the Supreme Court of the Territory of Hawaii.*

— Term.

ACTION IN DAMAGES.

HALAWA PLANTATION, LIMITED,

Plaintiff and Defendant in Error,

vs.

COUNTY OF HAWAII,

Defendant and Plaintiff in Error.

**Order Allowing Writ of Error and [Fixing Amount  
of Bond Returnable in U. S. Circuit Court of  
Appeals].**

Upon reading and filing the foregoing Petition for a Writ of Error, together with an Assignment of Errors presented therewith, alleged to have occurred in the judgment of this Court, and the proceedings in



the trial of said cause prior thereto.

IT IS ORDERED that a Writ of Error be and the same is hereby allowed to the County of Hawaii to have reviewed, by the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered in the above-entitled cause, and the proceedings in the trial of said cause prior thereto, that the amount of the bond to be filed in this court by the said County of Hawaii, in connection with the Writ of Error prayed for, be and the same is hereby fixed in the sum of \$15,000;

AND IT IS FURTHER ORDERED that, upon the filing of an approved bond in the said amount, all further proceedings in this court, and in the Circuit Court of the [334] Third Judicial Circuit of the Territory of Hawaii, in said cause shall be suspended and stayed until the determination of such Writ of Error by the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Honolulu, this 14th day of December, 1915.

[Seal] (Signed) A. G. M. ROBERTSON,  
Chief Justice of the Supreme Court of the Territory  
of Hawaii.

[Endorsed]: No. 846. Filed December 14, 1915,  
at 10:38 A. M. J. A. Thompson, Clerk. [335]

*In the Supreme Court of the Territory of Hawaii.*

— Term.

ACTION IN DAMAGES.

HALAWA PLANTATION, LIMITED,

Plaintiff and Defendant in Error,

vs.

COUNTY OF HAWAII,

Defendant and Plaintiff in Error.

**Writ of Error [Returnable in U. S. Circuit Court of Appeals].**

United States of America,—ss.

The President of the United States of America to the  
Honorable Justices of the Supreme Court of the  
Territory of Hawaii, Greeting:

Because in the record and proceedings as also in the rendition of the judgment in the above-entitled cause errors alleged to have happened to the prejudice of the County of Hawaii, defendant and plaintiff in error, as by petition in the said Supreme Court of the Territory of Hawaii for said writ of error appears:

NOW, THEREFORE, in order that said errors, if any there be, should be duly corrected and full and speedy justice be done to the parties aforesaid, you are commanded to send under your seal the records and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals of the Ninth Circuit at its courtrooms in the city of San [336] Francisco, State of California, together with this writ, and to have the same at the

said place when the said United States Circuit Court of Appeals of the Ninth Circuit is sitting within thirty (30) days from the date hereof, so that the records and proceedings aforesaid may be then and there inspected and so that whatever is of right and according to the law of the United States of America may be done.

WITNESS The Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 14th day of December, 1915.

[Seal]

J. A. THOMPSON,

Clerk of the Supreme Court of the Territory of Hawaii.

The foregoing is hereby allowed.

Dated the 14th day of December, 1915.

[Seal]

A. G. M. ROBERTSON,

Chief Justice of the Supreme Court of the Territory of Hawaii. [337]

[Endorsed]: No. 846. Supreme Court, Territory of Hawaii. Halawa Plantation, Limited, Plaintiff and Defendant in Error, vs. County of Hawaii, Defendant and Plaintiff in Error. Petition for Writ of Error and Supersedeas, Assignment of Errors, Order Allowing Writ of Error and Supersedeas and Writ of Error. Filed December 14, 1915, at 10:38 A. M. J. A. Thompson, Clerk. [338]

STAMPS.

STAMPS.

*In the Supreme Court of the Territory of Hawaii.*

— Term.

ACTION IN DAMAGES.

HALAWA PLANTATION, LIMITED,

Plaintiff and Defendant in Error,

vs.

COUNTY OF HAWAII,

Defendant and Plaintiff in Error.

**Supersedeas and Cost Bond on Writ of Error  
[Returnable in U. S. Circuit Court of Appeals].**

KNOW ALL MEN BY THESE PRESENTS,  
That the County of Hawaii as principal, and the Hawaiian Insurance and Guaranty Company, Limited, as surety, are jointly and severally held and firmly bound unto the Halawa Plantation, Limited, a corporation, in the sum of Fifteen Thousand (\$15,000) Dollars, to the payment whereof they hereby bind themselves, their successors and assigns.

The condition of this bond is as follows:

Whereas, in the above-entitled cause, a petition has been filed for the allowance of a writ of error to have the judgment of the Supreme Court of the Territory of Hawaii, entered and filed in the above-entitled cause, on or about the 24th day of September, 1915, and the proceedings in the said cause prior thereto reviewed by the United States Circuit Court of Appeals for the Ninth Circuit and to have issued a supersedeas herein;

NOW, THEREFORE, If such writ of error and



[339] supersedeas shall issue according to the prayer of the petition in that behalf, and if the County of Hawaii, the above-bounden principal, shall prosecute the said writ of error to final determination and shall answer all damages and costs, if it fails to make good its plea, then the above obligation shall be void, otherwise to remain in full force and effect.

COUNTY OF HAWAII.

BY BOARD OF SUPERVISORS OF THE  
COUNTY OF HAWAII.

Per SAMUEL KAHAHAUE,  
Chairman and Executive Officer.

A. A. HAPAI, [Seal]  
Clerk, County of Hawaii.

HAWAIIAN INSURANCE & GUARANTY  
CO., LTD.

H. D. MARINER, [Seal]  
Treasurer and Manager.

The foregoing bond is approved as to form and sufficiency this 14th day of December, 1915.

(Signed) A. G. M. ROBERTSON,  
Chief Justice of the Supreme Court of the Territory  
of Hawaii. [340]

[Endorsed]: Original. No. 846. Supreme Court, Territory of Hawaii. Term, 1915, Session. Halawa Plantation, Limited, Plaintiff and Defendant in Error, vs. County of Hawaii, Defendant and Plaintiff in Error. Supersedeas and Cost Bond on Writ of Error. Filed December 14, 1915, at 10:38 A. M. J. A. Thompson, Clerk. [341]

**[Citation on Writ of Error Returnable in U. S.  
Circuit Court of Appeals.]**

*In the Supreme Court of the Territory of Hawaii.*

— Term.

**ACTION IN DAMAGES.**

**HALAWA PLANTATION, LIMITED,**

**Plaintiff and Defendant in Error,**

**vs.**

**COUNTY OF HAWAII,**

**Defendant and Plaintiff in Error.**

The United States of America,—ss.

To the Halawa Plantation, Limited, a Corporation,  
Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California, within thirty (30) days after the date of this citation, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the Territory of Hawaii, wherein the County of Hawaii is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

**WITNESS** The Honorable **EDWARD DOUGLAS WHITE**, Chief Justice of the Supreme Court

of the United States [343] this 14th day of December, 1915.

[Seal] A. G. M. ROBERTSON,  
Chief Justice of the Supreme Court of the Territory  
of Hawaii.

Receipt of a true copy hereof is hereby acknowledged this 18th day of December, 1915.

HOLMES & OLSON,  
Attorneys for Halawa Plantation, Limited, a Corporation. [344]

[Endorsed]: No. 846. Supreme Court, Territory of Hawaii. Halawa Plantation, Limited, Plaintiff and Defendant in Error, vs. County of Hawaii, Defendant and Plaintiff in Error. Citation in Error. Filed and issued for service December 14, 1915, at 10:55 A. M. J. A. Thompson, Clerk. Returned December 18, 1915, at 8:50 A. M. J. A. Thompson, Clerk. [345]

---

**Order Extending Time to March 13, 1916, for  
Preparation and Transmission of Record to U. S.  
Circuit Court of Appeals.]**

*In the Supreme Court of the Territory of Hawaii.*

— Term.

HALAWA PLANTATION, LIMITED,  
Plaintiff and Defendant in Error,  
vs.  
COUNTY OF HAWAII,  
Defendant and Plaintiff in Error.

Upon the application of counsel for defendant and plaintiff in error, and good cause appearing therefor, and pursuant to Section I of Rule 16 of the United States Circuit Court of Appeals for the Ninth Circuit, it is hereby ordered that the defendant and plaintiff in error and the clerk of this court be and they are hereby allowed until and including the 13th day of March, 1916, within which time to prepare and transmit to the clerk of the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the record in the above-entitled cause on Assignment of Errors and all [346] other papers required as part of said record.

Dated at Honolulu, Territory of Hawaii, this 12th day of January, 1916.

[Seal] A. G. M. ROBERTSON,  
Chief Justice of the Supreme Court of the Territory  
of Hawaii.

Approved:

HOLMES & OLSON,  
Attorneys for Plaintiff and Defendant in Error.  
[347]

[Endorsed]: No. 846. Supreme Court, Territory of Hawaii. Halawa Plantation, Limited, Plaintiff and Defendant in Error, vs. County of Hawaii, Defendant and Plaintiff in Error. Order Extending Time for Preparation and Transmission of Record. Filed January 12, 1916, at 2:20 P. M. J. A. Thompson, Clerk. [348]



*In the Supreme Court of the Territory of Hawaii.*

— Term.

HALAWA PLANTATION, LIMITED,  
Plaintiff and Defendant in Error,  
vs.

COUNTY OF HAWAII,  
Defendant and Plaintiff in Error.

**Amended Praecipe for Transcript [on Writ of Error  
Returnable in U. S. Circuit Court of Appeals].**

To James A. Thompson, Esq., Clerk of the Supreme  
Court of the Territory of Hawaii:

You will please prepare a transcript of a record in the above-entitled cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the Writ of Error heretofore issued by said Court, and include in said transcript the following pleadings, proceedings, opinions, judgments and papers on file in said cause, to wit:

1. Petition for Writ of Error to the Circuit Court of the Third Judicial Circuit of the Territory of Hawaii.
2. Assignment of Errors.
3. Notice of Issuance of Writ of Error.
4. Summons and Return of Service. [349]
5. Bond on Writ of Error.
6. Writ of Error.
7. Appearance for Defendant in Error.
8. Copy of Plaintiff's Complaint or Declaration.

9. Copy of Term Summons With Return of Service.
10. Copy of Defendant's Demurrer to Plaintiff's Complaint or Declaration.
11. Copy of Plaintiff's Joinder in Demurrer.
12. Copy of Minutes Showing the Overruling of Demurrer.
13. Copy of Defendant's Answer and Demand for Jury Trial.
14. Copy of Transcript of Evidence on Trial.
15. Copy of Defendant's Requested Instruction Numbers 5, 6 and Number 7.
16. Copy of Verdict of Jury.
17. Copy of Motion for New Trial.
18. Copy of Item in the Minutes Showing Denial of Motion for New Trial.
19. Copy of Judgment of Circuit Court.
20. Copy of Opinion of Supreme Court.
21. Copy of Judgment of Supreme Court.
22. Copy of Petition for Writ of Error and Supersedeas.
23. Copy of Assignment of Errors.
24. Copy of Citation of Writ of Error and Admission of Service.
25. Copy of Order Allowing Writ of Error and Supersedeas.
26. Copy of Bond on Writ of Error.
27. Copy of Writ of Error.
28. Copy of Amended Praecipe for Transcript.
29. Copy of Order Extending Time for Preparation and Transmission of Record.

You will also annex to and transmit with the record the original Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit, and [350] Citation with Return of Service, your Return to the Writ of Error under the Seal of the Supreme Court of the Territory of Hawaii and also your Certificate under Seal stating in detail the cost of the record and by whom the same was paid.

Honolulu, January 25, 1916.

Respectfully,

(Signed) WM. H. HEEN,  
Deputy Attorney General.

Service of a copy of the foregoing Amended Praecipe for Transcript is hereby acknowledged.

(Signed) HOLMES & OLSON,  
Attorneys for Plaintiff and Defendant in Error.

[351]

[Endorsed]: No. 846. Supreme Court, Territory of Hawaii. Halawa Plantation, Limited, Plaintiff and Defendant in Error, vs. County of Hawaii, Defendant and Plaintiff in Error. Amended Praecipe for Transcript. Filed January 27, 1916, at 10:12 A. M. J. A. Thompson, Clerk. [352]

*In the Supreme Court of the Territory of Hawaii.*

— Term.

**ACTION IN DAMAGES.**

**HALAWA PLANTATION, LIMITED,**

Plaintiff and Defendant in Error,

vs.

**COUNTY OF HAWAII,**

Defendant and Plaintiff in Error.

**Supplemental Praecipe [for Transcript on Writ of Error Returnable in U. S. Circuit Court of Appeals].**

To James A. Thompson, Esq., Clerk of the Supreme Court of the Territory of Hawaii:

You will please transmit with the record in the above-entitled cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the Writ of Error heretofore issued by said Court, the following original exhibits, to wit:

Plaintiff's Exhibit 1, a Photograph;

Plaintiff's Exhibit 2, a Photograph;

Plaintiff's Exhibit 3, a Photograph;

Plaintiff's Exhibit 4, a Photograph;

Plaintiff's Exhibit 5, a Photograph;

Plaintiff's Exhibit 6, a Photograph;

Plaintiff's Exhibit 7, a Photograph; [353]

Plaintiff's Exhibit 8, a Photograph;

Plaintiff's Exhibit 9, a Photograph; and

Plaintiff's Exhibit 10, Tracing of Map of Burnt Area.



Dated at Honolulu, January 28th, 1916.

Respectfully,

WM. H. HEEN,

Deputy Attorney General.

Service of a copy of the foregoing Supplemental Praecipe is hereby acknowledged.

HOLMES & OLSON,

Attorneys for Plaintiff and Defendant in Error.

[354]

[Endorsed]: No. 846. Supreme Court, Territory of Hawaii. Halawa Plantation, Limited, Plaintiff and Defendant in Error, vs. County of Hawaii, Defendant and Plaintiff in Error. Supplemental Praecipe. Filed January 29, 1916, at 11:00 A. M. J. A. Thompson, Clerk. [355]

---

*In the Supreme Court of the Territory of Hawaii.*

— Term.

ACTION IN DAMAGES.

HALAWA PLANTATION, LIMITED,

Plaintiff and Defendant in Error,

vs.

COUNTY OF HAWAII,

Defendant and Plaintiff in Error.

**Order Authorizing and Directing Transmission of Exhibits [to U. S. Circuit Court of Appeals].**

To James A. Thompson, Esq., Clerk of the Supreme Court of the Territory of Hawaii:

You are hereby authorized and directed, in connection with the Writ of Error from the United

States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to transmit as part of the record required by the Supplemental Praecipe of the defendant and plaintiff in error filed on this day, the following exhibits upon its counsel undertaking to return them to the files of this court:

Plaintiff's Exhibit 1, a Photograph;

Plaintiff's Exhibit 2, a Photograph;

Plaintiff's Exhibit 3, a Photograph;

Plaintiff's Exhibit 4, a Photograph;

Plaintiff's Exhibit 5, a Photograph; [356]

Plaintiff's Exhibit 6, a Photograph;

Plaintiff's Exhibit 7, a Photograph;

Plaintiff's Exhibit 8, a Photograph;

Plaintiff's Exhibit 9, a Photograph; and

Plaintiff's Exhibit 10, Tracing of Map of Burnt Area.

Dated at Honolulu, January 29th, 1916.

[Seal]

A. G. M. ROBERTSON,

Chief Justice of the Supreme Court of the Territory of Hawaii. [357]

[Endorsed]: Supreme Court, Territory of Hawaii. Halawa Plantation, Limited, Plaintiff and Defendant in Error, vs. County of Hawaii, Defendant and Plaintiff in Error. Order Authorizing and Directing Transmission of Exhibits. Filed January 29, 1916, at 11:00 A. M. J. A. Thompson, Clerk. [358]

*In the Supreme Court of the Territory of Hawaii.*

— Term.

ACTION IN DAMAGES.

HALAWA PLANTATION, LIMITED,

Plaintiff and Defendant in Error,

vs.

COUNTY OF HAWAII,

Defendant and Plaintiff in Error.

**Undertaking to Return Original Exhibits.**

To James A. Thompson, Esq., Clerk of the Supreme Court of the Territory of Hawaii:

I hereby undertake to return to the files of the Supreme Court of the Territory of Hawaii the following original exhibits directed to be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit, in accordance with the order of the Chief Justice of the Supreme Court of the Territory of Hawaii filed on this day:

Plaintiff's Exhibit 1, a Photograph;

Plaintiff's Exhibit 2, a Photograph;

Plaintiff's Exhibit 3, a Photograph;

Plaintiff's Exhibit 4, a Photograph;

Plaintiff's Exhibit 5, a Photograph;

Plaintiff's Exhibit 6, a Photograph; [359]

Plaintiff's Exhibit 7, a Photograph;

Plaintiff's Exhibit 8, a Photograph;

Plaintiff's Exhibit 9, a Photograph; and

Plaintiff's Exhibit 10, Tracing of Map of Burnt Area.

Dated at Honolulu, January 28th, 1916.

WM. H. HEEN,  
Deputy Attorney General,  
Attorney for Defendant and Plaintiff in Error.

[360]

[Endorsed]: Supreme Court, Territory of Hawaii.  
Halawa Plantation, Limited, Plaintiff and Defendant in Error, vs. County of Hawaii, Defendant and Plaintiff in Error. Undertaking to Return Original Exhibits. Filed January 29, 1916, at 11:00 A. M. J. A. Thompson, Clerk. [361]

---

[Certificate of Clerk, Supreme Court, Territory of Hawaii, to Transcript of Record, etc.]

*In the Supreme Court of the Territory of Hawaii.*

October Term, 1915.

HALAWA PLANTATION, LIMITED, a Corporation,

Plaintiff and Defendant in Error,

vs.

COUNTY OF HAWAII,

Defendant and Plaintiff in Error.

Territory of Hawaii,

City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, in obedience to the within Writ of Error, the original whereof is herewith returned, being pages 336 to 338, both inclusive, of the foregoing transcript, and in pursuance of the Amended Praecept to me directed, a copy whereof



is hereto attached, being pages 349 to 352, both inclusive, DO HEREBY transmit to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, the foregoing transcript of record, being pages 1 to 335, both inclusive, pages 339 to 342, both inclusive, and pages 353 to 361, both inclusive, and I CERTIFY the same to be full, true and correct copies of the pleadings, record, entries and final judgment which are now on file and of record in the office of the clerk of the Supreme Court of the Territory of Hawaii, in the case entitled in said court "Halawa Plantation, Limited, a Corporation, Plaintiff and Defendant in Error, versus County of Hawaii, Defendant and Plaintiff in Error, and Numbered 846.

I FURTHER CERTIFY, that the original Citation on Writ of Error and acknowledgment of receipt of a true copy thereof by Messrs. Holmes & Olson, Attorneys for the Plaintiff and Defendant in Error, being pages 343 to 345, both inclusive, and the original Order Extending Time for Preparation and Transmission of Record, being pages 346 to 348, both inclusive, of the foregoing transcript of record, are hereto attached and herewith returned.

I DO FURTHER CERTIFY that in pursuance of the Supplemental Praecept to me directed, a copy whereof is hereto attached, being pages 353 to 355, both inclusive, that pursuant to an Order Authorizing and Directing Transmission of Exhibits herein filed, a copy whereof is hereto attached, being pages 356 to 358, both inclusive, and of the Undertaking to

Return the Original Exhibits, a copy whereof is hereto attached, being pages 359 to 361, both inclusive, of the [362] foregoing transcript, I have included and do transmit herewith as part of the record in the foregoing entitled cause, the following original exhibits, viz.:

Plaintiff's Exhibit 1, a Photograph;  
Plaintiff's Exhibit 2, a Photograph;  
Plaintiff's Exhibit 3, a Photograph;  
Plaintiff's Exhibit 4, a Photograph;  
Plaintiff's Exhibit 5, a Photograph;  
Plaintiff's Exhibit 6, a Photograph;  
Plaintiff's Exhibit 7, a Photograph;  
Plaintiff's Exhibit 8, a Photograph;  
Plaintiff's Exhibit 9, a Photograph; and  
Plaintiff's Exhibit 10, Tracing of Map of Burnt Area.

I LASTLY CERTIFY that the cost of the foregoing transcript of record is \$72.60, and that said amount has been paid by William H. Beers, County Attorney of the County of Hawaii.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the Supreme Court of the Territory of Hawaii, at Honolulu, city and county of Honolulu, this 5th day of February, A. D. 1916.

[Seal] JAMES A. THOMPSON,  
Clerk Supreme Court of the Territory of Hawaii.

[363]

..

[Endorsed]: No. 2748. United States Circuit Court of Appeals for the Ninth Circuit. County of Hawaii, Plaintiff in Error, vs. Halawa Plantation, Limited, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

Filed February 16, 1916.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.



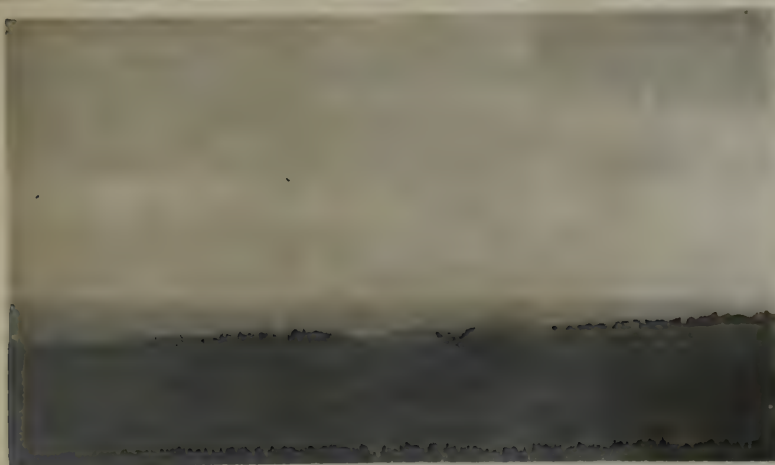


# Plaintiff's Exhibit 1



No. 846  
 View of forest in the Sub-mine.  
 Taken May 11, 1913 at 3:25 p.m.  
 J. H. Thompson  
 Minn.

# Plaintiff's Exhibit 2



Case No. 2778  
 U. S. Circuit Court of Appeals  
 For the

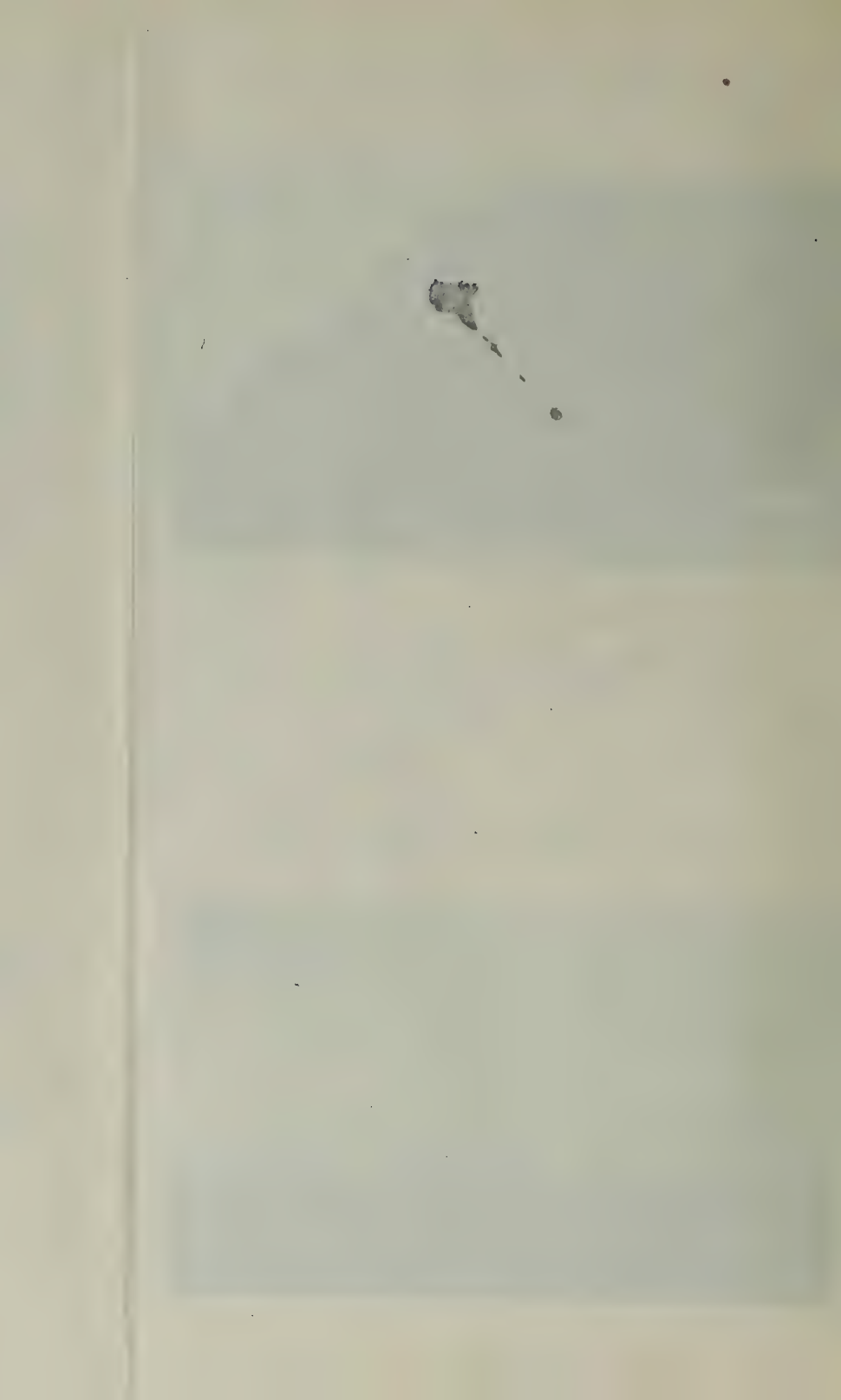
Plaintiff's Exhibit No. 1

Filed Feb. 16-1916

Case No. 2778  
 U. S. Circuit Court of Appeals  
 For the

Plaintiff's Exhibit No. 2

Filed Feb. 16, 1916



# Plaintiff's Exhibit 3



Case No. 7743  
U. S. Circuit Court of Appeals  
for the Ninth Circuit

Plaintiff's Exhibit No. 3

Feb. 16-1916

By Bill  
Read and filed in the Supreme  
Court May 11, 1915 at 13:15-100,  
J. M. Thompson  
Attorney

# Plaintiff's Exhibit 1



Case No. 7743  
U. S. Circuit Court of Appeals  
For the Ninth Circuit

Plaintiff's Exhibit No. 1

Feb. 16-1916

Plaintiff's Exhibit No. 3

Feb. 16-1916





Plaintiff's Exhibit 5 340



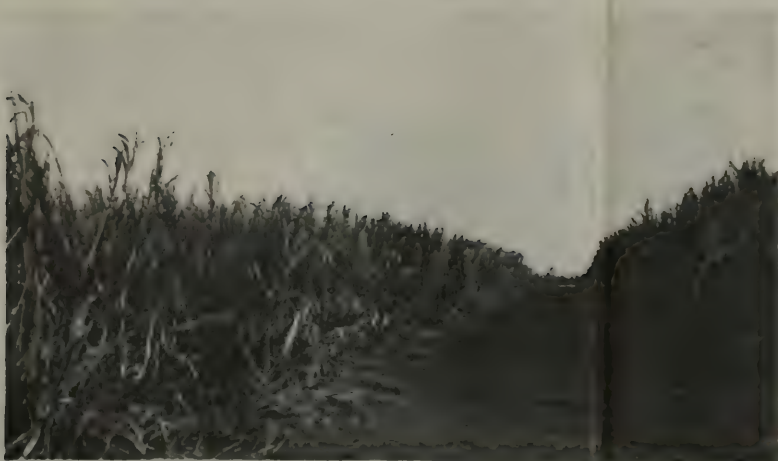
Case No. 2748  
U. S. Circuit Court of Appeals  
For the Ninth Circuit

Plaintiffs Exhibit 70. 5

Date Feb. 16 - 1916  
F. D. [illegible] [illegible]

846  
Tested and filed in the Supreme  
Court May 11, 1915 at 3:45 PM  
J. H. [illegible]  
[illegible]

Plaintiff's Exhibit 6



Case No. 2748  
U. S. Circuit Court of Appeals  
For the Ninth Circuit

Plaintiffs Exhibit 70. 6

Date Feb. 16 - 1916



Plaintiff's Exhibit 7



Case No. 2748  
U. S. Circuit Court of Appeals  
For the District of Columbia

Plaintiffs Exhibit 70.7

Filed Feb. 16-1916  
F. D. MONTGOMERY, Clerk

No. 546  
Writ was filed in the Supreme  
Court May 11, 1915 at 3:25 p.m.  
J. L. Thompson  
Clerk

Plaintiff's Exhibit 8



For the U. S. Circuit

Plaintiff's Exhibit 70.8

Filed Feb. 16-1916





Plaintiff's Exhibit 9



Case No. 27-5

U. S. Circuit Court of Appeals  
For the Ninth Circuit

Plaintiff's Exhibit

70-9

Filed Feb. 16-1916.

F. B. I. ...

Ex 846  
West Coast just in the Superior  
Court May 11, 1913 at 2:25 PM.  
A. H. ...



A hand-drawn map on aged paper showing a plantation layout. At the top, a horizontal line is labeled "Government Road". Below it, a diagonal line runs from the top center towards the bottom left, labeled "Plantation Road". Another diagonal line runs from the top right towards the bottom center, also labeled "Plantation Road". These roads divide the area into several fields. In the top right field, there is a dashed rectangle labeled "Area saved from fire 7.39 acres" and "Sage supplied by J. Atkins Mgr". To its right is a field labeled "Mulanra" and "Planted in 1891 by - Frisco". Below the "Area saved from fire" field is a field labeled "Pines". On the right side, near the bottom, is a field labeled "Pine forest which was destroyed by fire from bush". Along the bottom right boundary, there is a point labeled "Edge of Gulch". On the left side, there is a field labeled "Edge of bush". Various other fields are marked with handwritten letters: "b" in the top left, "x" in the middle left, "p" in the center, "L" in the bottom left, "E" in the bottom center, and "a" in the bottom right. The map is drawn with simple lines and includes some decorative elements like small circles along the boundaries.

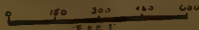
Platt of field, cone on which was burnt by fire, October 15<sup>th</sup> 1912.

Area on which cane was burnt 56.31 acres

Wm Bluetts

November 14<sup>th</sup> 19.

Scale: 300 feet to 1 inch



H. S. Circuit Court of Appeals

For the Illinois Chicago

Polymers, number 70.10

Ms. A. 9. 2. 16-1916.

P. U. Harpeth, 1887.

County of Hawaii

*Plumifera*

Nov. 21st

10.35 - 11.15

*Liliopsis montana*

They lay hid in the

These 2 pages are  
upwards of 1000-1000

1875





5  
No. 2748

---

United States  
Circuit Court of Appeals

For the Ninth Circuit.

---

COUNTY OF HAWAII,

Plaintiff in Error,

vs.

HALAWA PLANTATION, LIMITED, a Corpora-  
tion,

Defendant in Error.

---

BRIEF ON  
BEHALF OF PLAINTIFF IN ERROR.

Filed

MAY 5 - 1916

E. D. Meecham,  
Clerk.

WADE WARREN THAYER,  
Attorney for Plaintiff in Error.

---



*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. 2748.

COUNTY OF HAWAII,

Plaintiff in Error,

vs.

HALAWA PLANTATION, LIMITED, a Corpora-  
tion,

Defendant in Error.

**Brief on Behalf of Plaintiff in Error.**

**STATEMENT OF THE CASE.**

The above-entitled action comes to this court on a Writ of Error to the Supreme Court of the Territory of Hawaii. The action came to the Supreme Court of the Territory on a Writ of Error to the Circuit Court of the Third Judicial Circuit of the Territory of Hawaii. The plaintiff in error above named was the defendant and plaintiff in error in the Supreme Court of the Territory of Hawaii and was defendant in the original proceeding in the lower court.

Defendant in error, the Halawa Plantation, Limited, a corporation existing under and by virtue of the laws of the Territory of Hawaii and operating a sugar plantation in the District of North Kohala, County of Hawaii, commenced the action by a complaint filed on date of July 22, 1915, wherein, as a basis of action, it alleged the burning of a field of sugar-cane, the property of the plaintiff corporation, by fire originating from a fire started on the

roadside on the morning of October 18, 1912, by road laborers employed by the County of Hawaii for the purposes of burning rubbish. The basis of the claim for damages was the alleged negligence of said employees in starting the fire and the alleged negligence in controlling it thereafter.

On date of August 13, 1912, the defendant the County of Hawaii, by Wm. H. Beers, County Attorney, demurred to the complaint, among other grounds of demurrer, alleging:

I.

That the same does not state facts sufficient to constitute a cause of action against the said defendant.

II.

That the said defendant, being a body corporate and politic, is not liable under the law for the alleged negligent and wrongful acts set forth in the said complaint.

III.

That the function of repairing, maintaining and constructing public streets, roads or highways being a Governmental function, the said defendant is not liable under the law for any negligent or wrongful acts committed by its servants or employees in respect to the performance of the said function.

IV.

That there is no authority by which the said defendant may be held for the alleged negligent and wrongful acts set forth in the said complaint. (Transcript of Record, page 22.)

On date of January 22, 1914, the Trial Court over-



ruled the demurrer and on date of May 11, 1914, the defendant, the County of Hawaii, answered by denying each and every allegation of the complaint and made a demand for a trial by jury. (Transcript of Record, page 26.)

The action came to trial, before a Jury, in the said Circuit Court on date of November 18, 1914. On date of November 25, 1914, the jury returned a verdict for plaintiff, the Halawa Plantation, Limited, in the sum of Eleven Thousand Seven Hundred Twenty-seven Dollars and Seventy-nine Cents (\$11,727.79) (Transcript of Record, page 298), and on date of December 3, 1914 judgment for the sum aforesaid was rendered and entered in favor of said plaintiff and against said defendant (Transcript of Record, page 300).

On date of April 17, 1915, a Writ of Error issued from the Supreme Court of the Territory of Hawaii directed to the said Circuit Court of the Third Judicial Circuit, by virtue of which the record of all proceedings in said Circuit Court was sent to the Supreme Court of the Territory of Hawaii for review. The Assignments of Error in the said Writ of Error were eleven in number. (Transcript of Record, page 3.) The Assignments of Error numbered 1, 2, 3 and 11 were directed respectively to the action of the lower court in overruling the demurrer to the complaint, denying the motion for nonsuit, denying the motion for directed verdict and denying the motion for new trial. The basis of all of said four Assignments of Error was the claimed immunity of the defendant, the County of Hawaii, from liability

for the injuries alleged to have been caused by the negligence of its employees.

The Assignments of Error numbered 4, 5 and 6 related to the giving of instructions requested by the plaintiff corporation. These Assignments were formal in their character and merely served to preserve intact the claimed immunity of the defendant as aforesaid.

The Assignments of Error numbered 7, 8, 9 and 10 related respectively to the refusal of the court to give defendant's requested instructions numbered 5, 6 and 7, bearing upon the question of contributory negligence, and the refusal to give any instructions on the said question of contributory negligence. These requested instructions will be quoted at length in the argument upon this question.

The trial of the case was quite protracted and much of the evidence of a complicated and technical character but no error was claimed as to the wrongful admission or rejection of evidence or as to the actual loss, as fixed by the jury, resulting from the burning of the cane.

So that before the Supreme Court of the Territory of Hawaii, but two vital questions were presented, first, as to whether the County of Hawaii was liable for the damages sustained by the plaintiff corporation, and, second, as to whether the question of contributory negligence of the plaintiff was a question of law for the court or a question of fact to be submitted to the jury.

The decision of the Supreme Court in full is on pages 301 to 308, inclusive, of the Transcript of

Record. The specific errors of which complaint is made will be pointed out in argument hereinafter.

The Assignments of Error in the Writ of Error from this court directed to the Supreme Court of the Territory of Hawaii are five in number. The first two of said Assignments relate to the question as to whether the County of Hawaii is liable for the injuries sustained by reason of the negligence of its employees. The last three Assignments relate to the question as to whether the conditions surrounding the field of cane, and their bearing on the question of contributory negligence on the part of plaintiff corporation, were questions of fact for the jury or questions of law for the Court.

That this Court may better comprehend the arguments hereinafter set forth, a brief description of the location where the fire occurred, as disclosed by the evidence, might well be in order at this point.

The district of North Kohala is located along the north coast of the County of Hawaii and extends from the seacoast to the crest of the ridge of the Kohala mountains at an approximate elevation of four thousand feet and distant four miles or more from the sea. The coast line runs nearly due east and west and is nearly parallel to the crest of the ridge of the mountains. The cane belt of the district is along the seacoast and extends inland, a distance nearly two miles and at an elevation of about fifteen hundred feet. Within this cane belt are five sugar plantations, and they are located as follows, beginning at the east end: Nioului, Halawa, Kohala, Union Mill and Hawi. Each of the five plantations has a frontage on the sea and extends

inland with a width nearly uniform with the sea frontage. Across each of said five plantations, nearly parallel with the seacoast and nearly a mile distant therefrom, at an elevation between six or seven hundred feet, runs the main Government road, the highway for all traffic to and fro from one end of the district to the other.

Within and a part of the lands included in the plantation of the plaintiff corporation was a leasehold of a land known as Aamakao. Within and a part of said land of Aamakao and included in and part of the said leasehold was a gulch known as Aamakao Gulch extending inland at right angles from the sea.

The gulch of Aamakao was described by Atkins Wight, a witness for the plaintiff corporation and its manager at the time of the fire, as wide and deep—too wide to be bridged across the top from side to side at the level of the cane-field. The evidence showed that the slopes or sides of the gulch were from two hundred and fifty to three hundred feet from the top to the bottom and the bottom of the gulch approximately two hundred feet across. The evidence also showed that the slopes or sides of the gulch were too steep for cultivation and were abandoned to a growth of wild vegetation, which on the slope on the west side, being exposed to the morning sun, was of exceedingly rank growth. Where the road reached the top of the slope on the west side of the Aamakao Gulch it turned inland descending on a grade along the side of the slope to the bottom, thence straight across the bottom ascending the opposite side



on a similar grade, reaching the level of the cane-fields on the east side at a point nearly opposite where it began to descend on the west side. A road thus constructed along the slopes of the gulch would necessarily have a high bank on the upper side and a steep descent on the lower side. Plaintiff's Exhibit I (Transcript, page 338), a photograph, shows the road near the bottom of the slope on the west side where it turns to cross the gulch. On date of October 18, 1912, the date of the fire in question, a contractor, under a contract from the County of Hawaii, had about completed a concrete bridge across the watercourse at the bottom of the gulch. The photograph does not show the bridge but does show the tool-house used by the contractor. The testimony of Southworth, who was at that time the County Engineer of the County of Hawaii, a witness for plaintiff, locates the bridge at a short distance east of the tool-house. The approaches to the bridge were to be made of fills of rocks and earth and were not a part of the bridge contract but were to be made by the road laborers of the district of North Kohala in the employ of the County. For the purpose of excavating materials for the fills or approaches to the bridge, the road laborers arrived at the vicinity of the bridge about seven A. M. on the said date of October 18, 1912. They were divided into two gangs, one gang going to the east side of the bridge and the other, consisting of seven men including a luna (Hawaiian for foreman), to the west side. The gang on the west side of the bridge started the fire which later caught in the accumulation of dry vege-

tation lying on the west slope of the gulch and by said vegetation was carried to the cane-field.

The spot where the original fire was started by the road laborers is shown in said photograph (Plaintiff's Exhibit I), where the man is standing on the roadside near the foot of the west slope of the gulch. Behind the man can be faintly distinguished a high bank on the upper side of the road, which said bank is more than twice the height of the man. The evidence showed the height to be about eleven feet. The testimony of Southworth (Transcript of Record, pages 87 to 90), witness for plaintiff, showed that this bank, before the time of the fire, was overgrown with a rank growth of grass and other vegetation. The same witness also testified that the entire slope of the gulch at the same time was thickly covered with an accumulation of dry rubbish, consisting of grass, weeds and leaves from lauhala trees. He described the same as being exceedingly dry. The photograph (Plaintiff's Exhibit I) shows the lauhala trees. The cane-field, as appears from the said photograph, was not visible from the place on the roadside where the fire began but the luna of the road gang on the west side of the gulch, called as a witness by the plaintiff, testified that he knew that over the crest of the slope of the gulch there was a cane-field. Atkins Wight, manager of the plantation at the time of the fire, and witness for plaintiff corporation, testified that the accumulation of dry material on the slope of the gulch extended from the place where the fire was started up to and into the cane-field which was separated from the slope of the

gulch by a wire fence only. (Transcript of Record, pages 257 to 259.) The testimony of all of the witnesses was that for about three months prior to the time of the fire there had been no rain in the district of North Kohala and that all vegetation had become dried up.

By the luna's direction the bank and a part of the roadside were cleared of the dry grass and other vegetable matter and the dry material thus cleared was gathered into a pile in the gutter on the upper side of the road and next to the bank. One laborer was on the road with the luna, another was on the upper edge of the bank directly above the fire and the others were near. Shortly after seven o'clock A. M. the luna directed the laborer who was with him on the road to set fire to the pile of rubbish on the roadside. The wind, which was the regular trade wind of that district, up to this time had been blowing moderately, but soon after the fire was lighted, according to the testimony of the luna and the other laborers, the wind suddenly increased. There can be no doubt from the evidence adduced that, to the minds of the men there present, there was an apparent increased velocity of wind which they were not able to describe intelligently. One witness stated that it was a strange wind and compared it to a whirlwind. There can be no doubt that the laborers there present found the fire they had started caught by a wind that was unexpected. The fire soon caught on the slope above the bank and, despite anything the laborers could do, it quickly swept up in the face of the wind along the

slope which was thickly covered with dry vegetable matter and into the cane-field.

### ERRORS RELIED UPON.

The foregoing statement of the case discloses two and only two questions to be considered by this Court, namely:

First. Is the County of Hawaii liable for the consequences of the alleged negligent acts of its employees as set out in the complaint in this action and as raised by the first and second Assignments of Error herein? (Transcript of Record, pages 313 and 314.)

Second. Was the question whether there was contributory negligence on the part of the plaintiff corporation a question of law for the court or a question of fact to be submitted to the jury as raised by the third, fourth and fifth Assignments of Error herein? (Transcript of Record, pages 314 to 317.)

### ARGUMENT.

The questions will be discussed in the order stated.

The first question was disposed of by the Supreme Court of the Territory of Hawaii in words as follows, to wit:

“The demurrer was properly overruled.  
 \* \* \* The facts alleged show negligence on the part of the servants of the defendant and that such negligence was the proximate cause of the injury alleged. The liability of the defendant county for such negligence is settled in this jurisdiction by the decisions in *Matsumura v. County of Hawaii*, 19 Haw. 18



and 496. We are inclined to believe that we would hold otherwise if this was a case of first impression, but the rule that a county is liable for the injury to private property caused by the negligent acts of its road employees, acting within the scope of their employment, having been announced in the first decision in the Matsumura case (19 Haw. 18), and reaffirmed in the same case in the later decision (19 Haw. 496) and the legislature having met in four regular sessions since the announcement of such rule without enacting any statute adopting a different rule, we must consider that the legislature has acquiesced in the rule announced.

\* \* \*

The defendant's motion for a directed verdict was based principally upon the ground that the defendant as a body corporate and politic is not liable for the negligent acts of its employees, acting within the scope of their employment, and was properly denied for the reasons heretofore given for overruling the demurrer."

(Transcript of Record, pages 303 to 305.)

The said Supreme Court of the Territory of Hawaii held the precedent of the Matsumura case as controlling in the case at bar. The question has not before been taken to a higher court and therefore is now an open question before this court. But aside from the fact that the ruling in the Matsumura case is still open to the consideration of this court, there are facts in the said case which, we

contend, distinguish it from the pending one. The facts of the Matsumura case are substantially as follows: Some employees of the County of Hawaii, engaged in authorized road repairs, to facilitate their work, tapped an available flume of water and brought and used the water on the road for sluicing purposes. The action of the water loosened a large embankment of earth, thereby precipitating it down a slope upon Matsumura's premises and demolishing his dwelling-house and store. Matsumura brought action against the County of Hawaii. The defendant demurred and the lower court sustained the demurrer. The first decision (19 Haw. 18) was on the appeal from that ruling. The Appellate Court was divided, two joining in overruling the lower court and one, Justice Wilder, dissenting. The prevailing opinion was written by Justice Ballou, and there are few opinions in which there appears a more careful analysis of the mass of confusing authorities. The later decision in the same case (19 Haw. 496) dealt on only questions of error committed at the trial. It is principally the former of said decisions we have now to consider. But the decisive point in the Matsumura case, which distinguishes it from the case at bar, must be carefully observed. In the case we are now considering, we contend that the point upon which the decision must turn is whether the repair of highways in a county in the Territory of Hawaii is to be classed as a governmental function or as a private or corporate function. But in the Matsumura case the point upon which the decision hinged was

the invasion of a constitutional property right. On page 22 of the decision in said case Justice Ballou said:

“The only possible exemption applicable seems to be that taken in those cases which draw a distinction between the governmental and corporate function of a municipality.”

And then a little later on same page said:

“We need not enter into a discussion of these authorities, however, nor even into those holding that the repair of highways is properly classed as a corporate and not a governmental function, because we are of the opinion that under no proper conception of the doctrine of municipal immunity in the performance of governmental functions can it be held to include immunity for negligence resulting in the direct invasion of plaintiff’s private right as an adjacent land owner.”

And again at the bottom of page 23 said:

“The case at bar is concerned only with the invasion of a private right through misfeasance of the defendant’s agent, either as a necessary result of his wrongful act or because of the negligent manner in which it was done. Upon either theory a municipal corporation would be liable.”

The distinction between the Matsumura case and the case at bar is well illustrated by two cases both in the same jurisdiction, namely, *Ashley v. Port Huron*, 35 Mich. 296, and *Alberts v. City of Muskegon*, 146 Mich. 210.

In the former case, *Ashley v. Port Huron*, the action was to recover damages for injury to plaintiff's house caused by negligence in the construction of a sewer which threw large quantities of water upon the premises which otherwise would not have flowed there,—closely paralleling the *Matsumura* case.

In the latter case, *Alberts v. City of Muskegon*, the action was to recover damages for the destruction of plaintiff's barn by fire, caused by negligence of municipal employees in the operation of a steam roller, used in repairing the streets adjacent to plaintiff's property. The evidence showed that the defendant City was repairing the street with crushed stone and in the operation was using a roller moved and operated by steam; that the fuel used was coal; that the stack of the engine was not equipped with a spark-arrester; that the wind was blowing from the roller towards the barn; that fire escaped from the stack, igniting dry rubbish which carried the fire to the barn and destroyed the barn and its contents. The case closely parallels the case we are now considering.

In the former case, *Ashley v. Port Huron* (and it is to be observed that the decision was written by Chief Justice Cooley, author of *Constitutional Limitations*), after discussing numerous authorities, the Court held as follows:

“It is very manifest from this reference to authorities that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act



which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable, and no more an actionable wrong, than the other. Each is a trespass, and in each instance the City exceeds its lawful jurisdiction."

In the later case of *Alberts v. City of Muskegon*, the Court, among other things, said:

"The case at bar is not of damages resulting from a direct trespass or from misfeasance of the City amounting to a trespass. It is a case of consequential inquiry resulting directly from the negligent conduct of the defendant's agents. In this fact lies the distinction which, in view of former decisions of this court, must be made, and, when made, is controlling."

The Court then referred to said "former decisions," among which was the said case of *Ashley v. Port Huron* and quoted with approval that part of said decision hereinbefore quoted. The Court then continuing, said:

“In the case at bar, it cannot be said that the burning of plaintiff’s property was the necessary result of employing the roller as equipped upon the road. The machine and the agents of the City were employed in performing public work. This employment involved no injury to plaintiff’s property. Between the performance of the work and the injury complained of were the alleged facts of improper equipment of the roller; direction and velocity of the prevailing wind; management of the machine. In some respects, the case may be regarded as closely resembling many in which municipal liability has been judicially affirmed. In essentials it belongs to the class of cases where the injury is the result of negligence of municipal agents employed in public work for which the municipality is not at common law liable.

“The judgment is reversed, with costs of both courts to defendant. No new trial will be granted.”

In Arkansas, California, Connecticut, Oklahoma, Massachusetts, Michigan, New Jersey, South Carolina, Vermont, Tennessee and Texas the duty of repairing and maintaining public highways is regarded as a governmental one, and in the absence of statute a municipality is not liable for negligence in respect thereto.

*Arkadelphia v. Windham*, 49 Ark. 139;  
*Winbiglar v. Los Angeles*, 45 Cal. 39;  
*Hewison v. New Haven*, 37 Conn. 475.  
*Blaylock v. Muskogee*, 117 Fed. 125;  
*Barney v. Lowell*, 98 Mass. 570;  
*Detroit v. Blackeby*, 21 Mich. 84.  
*Pray v. Jersey City*, 32 N. J. L. 394;  
*Young v. Charleston*, 20 S. C. 116;  
*Bates v. Rutland*, 62 Vt. 178;  
*Galveston v. Posnainsky*, 62 Tex. 118;  
*Connelly v. Nashville*, 110 Tenn. 262;  
*Wagner v. Portland*, 40 Ore. 389.

In the case of *Wagner v. Portland*, 40 Ore. 389, the application of the rule is described as follows:

“Municipal corporations exist in a dual capacity, and their functions are two-fold. In one they exercise the right springing from sovereignty, and, while in the performance of the duties pertaining thereto, their acts are political and governmental. Their officers and agents, though elected or appointed and paid by them, are nevertheless public functionaries, performing a public service in which the corporations, as such, have no particular interest, and from which they derive no special benefit or advantage in their private or corporate capacity. Such officials are not, strictly speaking, the servants and agents of the municipalities through which they derive their authority but are officers, agents and servants of the state, and for their acts of omission or commission the municipalities themselves are not liable.”

In the discussion of this phase of the question thus far no distinction has been made in the character of the defendant, as to whether a county or chartered municipality. But the common-law rule of immunity does make a distinction. Even in those jurisdictions which hold chartered municipalities not exempt from liability, counties are held exempt. It is not necessary to inquire whether the grounds upon which the distinction is made seem based on sound reasons. The authority for it is the decisions of the courts. It is a part of the common law and cannot be abolished except by the law-making power. The distinction is clearly pointed out by Addison on Torts as follows:

“A plainly marked distinction is made and should be observed between municipal corporations, as in incorporated villages, towns and cities, and those other organizations, such as townships, counties, school districts and the like, which are established without any express charter or act of incorporation, and clothed with but limited powers. These latter political subdivisions are called *quasi* corporations and the general rule of law is now well settled that no action can be maintained against corporations of this class by a private person, for their neglect of public duty unless such right of action is expressly given by a statute.”

And again, in the case of *Markey v. Queens Co.*, 154 N. Y. 675, it is said:



“There is a distinction between counties as civil divisions of the State for purposes of local government, and chartered municipal corporations in respect to their liability for corporate acts. This distinction was not abrogated by the county law, and it was not intended that counties should be treated as upon a par with cities, when engaged in similar transactions.”

In the case at bar, the Supreme Court of the Territory has held the defendant county not exempt from liability on the authority of the Matsumura case. But the decision in that case, as we have hereinbefore shown, makes plain the distinction between the two cases. The tort in that case was the invasion of a constitutional right. In the pending case, the basis of a tort is negligence of laborers while in the employ of the County.

If the authority of the Matsumura case does not control, is there any other precedent in the adjudicated cases in the Territory of Hawaii that does control? We contend that the case of *Coffield v. Territory*, 13 Haw. 478, controls. That action was one against the Territory before counties were formed and the maintenance of public highways transferred to them. It was based on a theory that the Territory was a municipal corporation. The case was taken to the Supreme Court on exceptions to an order sustaining a demurrer and dismissing the complaint and in its decision the Court said:

“In a certain sense all governments are municipal corporations. In this sense each of

the several States and the United States is such a corporation. Yet these, being sovereignties, are not liable to suit in their own courts except by their own consent. The same is true of certain political subdivisions, such as counties, townships, school districts, road boards, etc. These also are in a sense municipal corporations, and yet they share in the immunity of the State from liability to suit unless made liable by statute. They are often described as *quasi* corporations and are regarded principally as agencies, auxiliaries or instrumentalities of the general government. There is, however, a political subdivision of another class that is usually created by charter or incorporated under statutes, generally for a community more or less compact, supposedly at the request or with the consent, express or implied, of the members thereof, and mainly for the special interests and convenience of the particular locality and its people. Such corporations are supposed to have a private character to a certain extent, and are therefore held to be liable like other private corporations. They are often spoken of as municipal corporations proper as distinguished from the other class above referred to as *quasi* corporations. See I Dill. Mun. Corp., secs. 20, 23, 26. Bearing in mind this distinction between municipal corporations proper and *quasi* corporations, the general rule is, as stated in 2 Id. 997, 998, that 'In the United States, there is no common-law obligation resting upon *quasi*

corporations, such as counties, townships, and New England towns, to repair highways, streets, or bridges within their limits, and they are not obliged to do so unless by force of statute. Even when the legislature enjoins upon corporations of this character the duty to make and repair roads, streets, and bridges, and confers power to levy taxes therefor, the general tenor of the decisions is to treat this as a public, and not a corporate, duty, and to regard such corporations, in this respect, as public or State agencies, and not liable to be sued civilly for damages caused by the neglect to perform this duty, unless the action be expressly given by statute'; but, 'The general doctrine of American courts \* \* \* in respect of municipal corporations proper, has been to hold them civilly liable for injuries from defective streets.' This distinction may not be based altogether on sound reasoning but it is well established.

\* \* \* "

The function of repairing and maintaining public highways by the Territory of Hawaii was undoubtedly a governmental or public one. That the legislature has transferred to the counties the power to do the same thing does not change the nature of the function itself, and is the same now as before, namely, governmental.

The plaintiff in error in the case at bar, we contend, cannot be held responsible for the negligent act alleged in plaintiff's declaration. There is no

statute in the Territory of Hawaii which imposes upon a county any liability for tort.

“Counties are not subject to liability for any tort in the absence of statutes which either expressly or by implication impose such liability on them.”

11 Cyc. 497.

“The authorities are very decidedly against the doctrine that counties may be held liable for a negligent breach of duty respecting highway where there is no statute creating liability. The current of opinion is indeed against the liability of the county for injuries from negligence resulting from any cause, although directly connected with the county affairs, yet, under like circumstances, a municipal corporation would be held liable in most jurisdictions.”

Elliott on Roads & Streets, 2d ed., 458.

Swineford v. Franklin Co., 73 Mo. 279.

“In accordance with the prevailing doctrine it was held that a county is not liable for the negligence of a person engaged in work upon one of the highways owned by the county.”

Elliott on Roads & Streets, 2d ed., 458.

Fry v. Albermarle, 86 Va. 195.

“Public *quasi* corporations have been defined as: It is universally agreed that all those subdivisions of State territory, such as counties, townships, school districts and like bodies, which are created by the legislature for public purposes and without regard to the wishes of their inhabi-



tants, are to be included in the class known as '*quasi* corporations.' They are in essence local branches of the state government, though clothed with the corporate form in order that they may better perform the duties imposed upon them."

Abbott Municipal Corp. 12.

"The rule that counties are not liable for torts, in the absence of statute, is universally acknowledged, and the great weight of authority is in favor of the conclusion that, even when a duty is imposed by statute, the county is not liable for failure to perform it, in the absence of express provision creating such liability."

El Paso Co. v. Bish, 18 Colo. 474.

Marion Co. v. Riggs, 24 Kan. 255.

"The overwhelming weight of authority is to the effect that the duty of counties to construct and keep in repair highways and bridges whether imposed by the common law or by statute does not carry with it an implied liability to answer in damages for injuries sustained from defective or unsafe highways or bridges, and that such liability can only arise from express statutory enactment or by implication necessarily arising therefrom."

7 Am. & Eng. Ency. of Law, 950.

There is such an overwhelming mass of authorities in support of the immunity of counties from liability for tort that we deem it unnecessary to cite them at length.

## QUESTION OF CONTRIBUTORY NEGLIGENCE.

The Territory of Hawaii is divided into five judicial circuits. The Third Judicial Circuit includes the District of Kohala, Kona and Kau, of the Island of Hawaii. (Revised Laws, sec. 2261.) In the Territory of Hawaii, jurors are drawn from lists selected by the Jury Commissioners appointed by the Judges of the respective circuits. The lists are made "from the citizens, voters and residents of the several precincts in the circuit, as near as may be according to and in proportion with the respective number of registered voters last registered in each of such precincts." (Id., sec. 2412.) The County of Hawaii is coextensive with the Island of Hawaii. (Id., sec. 1497.)

In extent, the Island of Hawaii is approximately ninety miles from north to south and sixty miles from east to west. The aforesaid districts of Kohala, Kona and Kau are on the west side of the Island and County of Hawaii. (See any geographical map of the island.)

Judicial notice or knowledge may be defined as the cognizance of certain facts which Judges and jurors may, under the rules of legal procedure or otherwise, properly take and act upon without proof because they already know them. (16 Cyc. 849.)

Thus it will be seen that there might be many facts which do not appear in the record of this case, but of which any jury drawn might have such familiarity as to take judicial notice thereof. Any juror drawn in the Third Judicial Circuit would know that

the sugar industry is almost the exclusive industry in the Districts of Kohala and Kau, and perhaps the major industry in the District of Kona; that the laborers employed on the sugar plantations number many thousands, composed largely of foreign nationalities; that the sugar industry is confined entirely to territory bordering on the seacoast; that the interior of the island is mountainous, suitable only for cattle ranges and with sparse population; that there is only one governmental highway around the island, and usually located near the middle of the cane belt; that along said highway almost the entire population on the sugar plantations reside, so that the highway more resembles a city street than a country road.

Any juror so drawn would also be familiar with the habit of the sugar-cane plant; that it is of perennial growth and usually requires about eighteen months from planting to maturity; that it produces a long stalk of many joints, at every joint of which grows a long blade or leaf, which, during the progress of growth of the stalk, usually matures quickly and drops to the ground, producing a large accumulation of dry blades or leaves on the ground among the stalks of cane; that during a period of long continued dry weather, such blades from the cane stalks become very dry and are very inflammable.

Also there would be no juror not familiar with the lauhala tree, as its name indicates, a tree indigenous to Hawaii, not of tall growth but yielding long blade-like leaves in great profusion, which mature and drop somewhat like the leaves of the sugar-cane

producing on the ground under the trees a large accumulation of dry leaves, highly inflammable and which produce intense heat when burning; and also would know the regularity and direction of the trade winds which prevail during the summer months, and would also know all operations connected with the cultivation of sugar-cane. Perhaps there would be no juror drawn who would not know that fire in a cane-field does not burn the stalks of cane, but only the dry accumulation of cane blades or leaves on the ground; but he would also know that after thus burned the juices in the cane stalks soon deteriorate, and that after three or four days, the deterioration is rapid so that cane so burned must be quickly harvested and milled.

The map or plat of the field, on which the cane was burned (Transcript of Record, Plaintiff's Exhibit 10, page 343) shows where the road bends to descend the slope of the gulch. Plaintiff's Exhibit 1, a photograph (Transcript of Record, page 338), shows the place where the road again bends to cross the bottom of the gulch; shows where the fire started at where the man is standing in the photograph (Transcript of Record, page 87, 88); shows by the ink marks made on the photograph the widening path up which the fire traveled (Transcript of Record, page 90). The term "pali" which appears in the testimony is the Hawaiian word for bank, or slope, and may mean the bank formed on the upper side by grading the road, and may mean the slope or side of the gulch. Other words "mauka" and "makai," appearing in the testimony, are Hawaiian words in



common use, "Mauka" meaning inland, and "makai" meaning toward the sea.

The map or plat (Plaintiff's Exhibit 10, *supra*) shows that the prevailing northeast direction of the trade winds would blow squarely across the road up the slope of the gulch to the cane field.

The following instructions were requested by the defendant county and refused by the trial court:

"Instruction No. 5.

7 "The Court instructs you, Gentlemen of the Jury, that even if you find from the evidence that the road laborers employed by the defendant negligently started the original fire on the roadside at Aamakao, on the morning of October the 18th, 1912, as alleged in the plaintiff's complaint, or even that said laborers thereafter negligently managed said fire after it was started, still, if you also find that the space between where the fire was started and the cane field was a grove of lauhala trees, and that upon the ground under the said trees was an accumulation of dry lauhala leaves and other dry leaves, dry grass and other dry vegetation, and if you find that such dry materials were inflammable and that the same made an unbroken train of dry inflammable materials and that the same acted as an effective fire carrier from the place where the fire was started to where it entered the cane-field;

"And if you find that there was nothing else that could have acted as a fire carrier from the place where the fire was started to the cane-

field, and that but for said accumulation of dry materials the said fire could not have reached the cane-field of the plaintiff;

“And if you also find from the evidence that all the land included in the path of the fire from its starting point to the cane-field was also part of the land of Aamakao held under lease by the plaintiff, in its possession and under the control of its manager and servants;

“And if you also find that the manager of the plantation of the plaintiff, for a long period prior to the date of October 18th, 1912, had knowledge of all conditions of wind and weather existing in the District of North Kohala, and more especially at Aamakao, and had knowledge of the conditions as to the accumulation of dry materials in that part of the plaintiff's land, lying between the Government road and the east boundary of its cane-field and more especially the part thereof in the path over which the fire traveled from the place where it was started to the cane-field;

“And if you also find that with such knowledge, the manager or servants of the plaintiff neglected to do any acts to destroy the effectiveness of said accumulation of dry materials as a fire carrier, either by burning the same by a back-fire, or clearing away a space sufficient in width to stop any fire originating from any source on the windward side of the said cane-field;

“And if you believe that to destroy in some way the effectiveness of the dry materials as a fire carrier, to prevent any fire originating from any source, was such an act as any reasonably prudent person would have done, and that if such had been done, that then the fire could not have reached the cane-field, then I further instruct you that the neglect of the manager or servants of the plaintiff to destroy in some way the effectiveness of said dry materials as a fire carrier was contributory negligence and is, therefore, a bar to recovery of damages by the plaintiff, and that your verdict must be for the defendant.

“Instruction No. 6.

“You are instructed that contributory negligence is such negligence on the part of the plaintiff as helped to produce the injuries complained of, and if you find from a preponderance of all the evidence in this case that the plaintiff was guilty of any negligence that helped to bring about or produce the injury complained of, then in that case, the plaintiff cannot recover in this action.

“Sec. 1351, Sackett on Instructions.

“Instruction No. 7.

“You are instructed that the law places upon all persons the duty of exercising reasonable care to avoid injury, and even though you should believe from the evidence that the employees and servants of the defendant were negligent and

that the property of the plaintiff was injured thereby, still if the evidence also shows that the injury would have been avoided by the exercise of ordinary care by the plaintiff or its manager or servants, and that the said plaintiff or its manager or servants did not exercise such care, then you should find for the defendant.

“Sec. 1352, Sackett on Instructions.”

(Transcript of Record, pp. 295 to 297.)

The three instructions requested by the defendant, the County of Hawaii, and refused by the Trial Court all have the same import. The one designated No. 5 merely specifies in detail the facts by which the jury was to judge whether a reasonably prudent manager of a sugar plantation would have permitted such conditions to continue under the prevailing conditions of wind and weather at that time.

The following is the ruling of the appellate court, the Supreme Court of the Territory of Hawaii, bearing on the refusal of the Trial Court to give said instructions:

“The defendant requested the Court to instruct the jury upon the question of contributory negligence to the effect that although the jury should find that the injury to the plaintiff was caused by certain specified acts of negligence of the employees of the defendant, yet, if the jury should find from the evidence that the plaintiff was negligent in permitting the space intervening between the road where the fire was started and the cane-fields of the plaintiff to remain covered with dead grass and leaves



from lauhala trees there growing, that this was contributory negligence on the part of the plaintiff and that the verdict should be for the defendant. This request was properly denied. It involved the proposition that it was the duty of the plaintiff to keep a space outside of its cultivated fields clear of inflammable material, and failing to do so could not recover for damages sustained by the negligence of defendant's road employees in starting a fire on the road contiguous to such inflammable material. It is apparent that the fire was not started by accident, but intentionally and for the convenience of defendant's servants. The authorities cited by the defendant in support of the aforesaid proposition are cases where fires have been started from sparks emitted by steam engines running upon railways. We do not consider those authorities applicable to the case at bar for the reason that in such cases the adjoining owner has knowledge that fires are liable to occur from accident by the emission of sparks from steam engines daily traveling along the railway and he should take the precaution to keep inflammable material off of his own premises within the known danger zone. Here no such known danger existed and the plaintiff had no reason to apprehend danger to its property from fires likely to be started by accident, and the injury that it sustained was not caused by fire started by accident. The law does not require anyone to take precautions against un-

known intentional wrongful acts of another, nor make it his duty to presume that another will intentionally do a wrongful act that will result in injury to his property. If the failure of the plaintiff to keep the intervening space between the highway and its fields clear of leaves and dead grass is contributory negligence, it is such by reason of some rule of law imposing this duty upon it, in which event such failure might be held, as matter of law, to have contributed to the injury sustained. The requested instruction was based upon the presumed existence of such rule of law, but we know of no authority to sustain it under circumstances like those shown to have existed in the present case. We are therefore unable to hold that the Court erred in refusing to give the requested instruction, and hold that the same was properly refused."

(Transcript of Record, pp. 305, 306.)

The aforesaid decision apparently misconceives the basis of the ground for the requested instruction. The requested instruction involved no proposition that if the failure of plaintiff corporation to keep the intervening space between the highway and its fields clear of leaves and dead grass is contributory negligence, "it is such by reason of some rule of law imposing this duty upon it." The Court well said, "We know of no authority to sustain it," for there is no such rule of law. It was never contended by the defendant County, neither in the trial nor in the appellate court, that there was such a rule of law.

Under such conditions and circumstances, the manager of the plaintiff corporation permitted a valuable field of cane to lie for weeks, exposed to every contingency of fire that might originate anywhere windward of the cane-field and with no barrier to serve as a fire break other than a wire fence.

It is not contended that the foregoing facts and circumstances are indisputable proof of negligence on the part of the manager of the plaintiff corporation, but it is contended that, whether a careful, prudent manager would have thus exposed valuable property to the hazard of fire under such conditions and circumstances was a question for the jury. The failure of the Court to give the jury any instruction on the question of contributory negligence was in effect instructing the jury that such a condition under the circumstances was not negligence. Or, in other words, that plaintiff had a right to keep its waste lands in any condition it saw fit, regardless of whether defendant thereby incurred liability by the use of fire in conducting its road improvements.

The attitude of plaintiff toward defendant may be stated in another way.

The manager of the plaintiff corporation in effect said to defendant, "You may not employ the use of fire as your agent in conducting your road improvements, because I do not care to take the trouble to put my waste land in a safe condition to prevent your fire escaping to my cane-field."

The said opinion further continues:

"No known danger existed and the plaintiff had no reason to apprehend danger to its prop-

erty from fires likely to be started by accident, and the injury it sustained was not caused by fire started by accident. The law does not require anyone to take precautions against unknown intentional wrongful acts of another nor make it his duty to presume that another will intentionally do a wrongful act that will result in injury to his property."

The term, "intentionally do a wrongful act," as used by the Court, is too strong. There is no evidence to support a culpable *intention* to do a wrongful act. The strongest expression that could apply would be "negligently started a fire." Assuming, but not admitting, that the County was liable for the negligent act of its employee, and admitting the sound legal proposition that the law does not make it the duty of anyone to presume that another will negligently do an act that will result in injury to his property, yet the correlative of the proposition is just as true that the employee of the County had the same right to presume that the other had not negligently left its property exposed to danger. Both the trial and the appellate courts evaded the fact that it required the concurrent negligence of both parties to produce the injury. The proposition is as old as the story of the servant of Mann who drove his master's team along the road at a "smartish pace" and ran over the donkey belonging to Davies, who had turned it out on the road, hobbled so it could not get out of the way. It perhaps will be contended by counsel for the plaintiff corporation, as it was in the case of *Davies v. Mann*, that the servant



of the County should have discovered the exposed condition of plaintiff's cane-field. But that again raises a question of fact for the jury, not a question of law for the Court. (*Bradley v. Great Northern Ry. Co.*, 2 *Thomp. Neg.*, p. 1108.)

The contention of the plaintiff corporation seems to be, and we confess it has been sustained by both the Trial and the Supreme Courts, that a man can do as he pleases with his own property upon his own land; that he may imprudently expose it to danger regardless of the negligence of his neighbor; that his neighbor cannot dictate how he shall use his property. The contention of counsel for the County does not deny a man's abstract right to so deal with his own property on his own land; to neglect all precaution to shield it from fire or other dangerous elements. But counsel further contends that if one so imprudently exercises the abstract right which he has, so that his imprudent act thereby concurs with the negligence of his neighbor in the destruction of his own property, then his own imprudence, which is but another name for negligence, contributes to his own loss, and he cannot recover.

The case of *Keese v. C. N. & W. R. Co.*, 30 *Iowa*, 78, is perhaps as nearly in point with our contention as can be found. The action was for damages for the burning of plaintiff's haystacks, situated half a mile from the railroad on the open prairie, the intervening space being covered with inflammable material, and plaintiff having taken no precaution to destroy its effectiveness as a fire carrier by plowing around his stacks. Under instructions given by the

lower court, the verdict of the jury was for plaintiff, and defendant appealed. The instruction was as follows:

“When a person, in the ordinary exercise of his own rights, allows or places his property in an exposed position, and it is injured or destroyed by reason of the negligence of another, he may still recover for the consequences of such negligence; when a party leaves his property in an exposed position, he takes the risk of accidents, but not the risk of another’s negligence. If the plaintiff had his property in an exposed position, or put it up in an imprudent manner, if he placed it on his own premises, or where he had a lawful right to place it, he took the risk of its being burned by the accidental escape of fire from the defendant’s engines running near it; but he did not take the risk of negligence on the part of defendants, and, if his property has been destroyed by their negligence, he is entitled to recover its value.”

Because of error in the giving of the foregoing instruction, the Supreme Court, on defendant’s appeal, reversed the judgment and ordered a new trial. As grounds for reversal, the Supreme Court said:

“The doctrine was announced in and was well illustrated by the case of *Cook v. The Champlain Transportation Co.*, 1 Denio, 90. But that it has its limitations is very apparent from the proposition itself, as well as from the equally well-settled doctrine, that where a plaintiff has,

by his negligence, contributed to a loss, he cannot recover therefor. The owner of land along a railway has the right to stack his wheat or hay, or to build and operate a powder-house on the line or margin of the right of way of a railroad. But the instinctive sense of prudence innate in every reasonable person would say that such a use of one's own property was *per se* negligence—carelessness. It being negligence to thus place his property in such an exposed position, he could not recover, although it should be destroyed by reason of the negligence of the railroad company, because his own negligence in thus placing his property contributed to the injury and loss. Or, suppose the owner of an elevator on the line of a railroad should make a thatched roof, instead of a shingle or slate roof, which he clearly has an abstract right to do, and, by reason of such thatched roof and the negligence of the railroad company, his elevator should be consumed by fire,—could he recover? Clearly not; and why? Not because he had no right to build his elevator and thatch the roof, but because to do so is negligence, carelessness, which contributed to his loss.

“Now, although the plaintiff had the right to stack his hay on the open prairie, and thereby only took the risk of accidents and not of defendant's negligence, yet, if by plowing around his stacks, or otherwise protecting them, he could have prevented the loss, and to omit thus protecting them was negligence, he could not,

under the well-settled rule above stated, be entitled to recover. But the instruction says, 'if the plaintiff had his property in an exposed position, or put it up in an imprudent manner, if he placed it where he had a lawful right to place it, etc.,' he may recover if it was destroyed by the negligence of defendants. Could he recover if it was negligence to thus place his property and leave it without any protection, and the absence of such protection contributed to its loss? Surely not; for where both parties have been guilty of negligence contributing to the loss neither can recover. The instruction, then, is fatally defective, in that it does not submit to the jury the question whether plaintiff by his negligence contributed to his loss, and, if so, then he could not recover. And it is not only defective in this, but is affirmatively erroneous, in that it says to the jury that the plaintiff may recover, although he placed his property in an exposed position and put it up in an *imprudent manner*. What is an imprudent act? It is no more or less than a heedless, rash, careless, negligent act. So that in fact the jury was told that plaintiff could recover for his hay, although he was guilty of negligence in the manner of putting it up."

The said Supreme Court of the Territory of Hawaii makes a distinction in the danger that arises from sparks emitted from a railway locomotive, and the danger from the fire under the conditions we are



now considering, and held, as a question of law, that there is a known danger zone along the line of a railway and that there was no danger existing on the slopes of Aamakao gulch, or along the public road across said gulch. But that is a question of fact for the jury and not a question of law for the Court. Modern railway locomotives are equipped so that the danger from fire is reduced to the minimum. Along the road across Aamakao gulch probably hundreds of persons pass daily, from any one of whom there was more danger from fire from the use of cigarettes than from a modern equipped locomotive. The twelve jurors who sat in the trial court were familiar with the dangers that arise from such causes and were familiar with the precautions prudent plantation managers take to guard against such dangers. The law makes the jury the sole judge in such cases. This was the question the defendant requested to have submitted to the jury, but which was refused by the trial court, and is one of the questions that has brought the case to this court. Perhaps every juror who sat in the trial court had lived and labored on sugar plantations during such a drought and knew the habits of plantation laborers, as to the use of cigarettes.

The application of the rule that governs in such instances is clearly stated in the case of *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408. Although a railroad was involved the question of negligence was not a case of fire started by sparks from a locomotive. One of the instructions given to the jury in the trial court was as follows:

“You fix the standard for reasonable, prudent, and cautious men under the circumstances of the case as you find them, according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved and try it by that standard; and neither the Judge who tries the case nor any other person can supply you with the criterion of judgment by any opinion he may have on that subject.”

The verdict was in plaintiff's favor and the defendant railway company sued out a writ of error from the U. S. Supreme Court, one of the assignments of error being the giving of aforesaid instruction. The U. S. Supreme Court in commenting thereon said:

“But it seems to us that the instruction was correct, as an abstract principle of law, and was also applicable to the facts brought out at the trial of the case. There is no fixed standard in the law by which a Court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms ‘ordinary care,’ ‘reasonable prudence,’ and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy

of the law has relegated the determination of such questions to the jury, under proper instructions from the Court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury."

Further in the same opinion, the Court said:

"It is earnestly insisted that, although the defendant may have been guilty of negligence in the management of its train which caused the accident, yet the evidence in the case given by the plaintiff's own witnesses shows that the deceased himself was so negligent in the premises that but for such contributory negligence on his part the accident would not have happened; and it is, therefore, contended that the court below should, as matter of law, have so determined, and it not having done so, this Court should so declare, and reverse its judgment. To this argument several answers might be given, but the main reason why it is unsound is this: As the question of negligence on the part of the defendant was one of fact for the jury to determine, under all the circumstances of the case, and under proper instructions from the

Court, so also the question of whether there was negligence in the deceased which was the proximate cause of the injury, was likewise a question of fact for the jury to determine, under like rules. \* \* \* There is no more of an absolute standard of ordinary care and diligence in the one instance than in the other."

#### CONCLUSION.

For the reasons hereinbefore set forth, it is respectfully submitted that the judgment heretofore rendered on behalf of the defendant in error should be reversed.

Respectfully submitted,  
(Sgd.) WADE WARREN THAYER,  
Attorney for Plaintiff in Error.



No. 2748

---

---

In the United States Circuit Court of  
Appeals for the Ninth Circuit

---

COUNTY OF HAWAII,  
Plaintiff-in-Error,

vs.

HALAWA PLANTATION,  
LIMITED, a CORPORATION,  
Defendant-in-Error.

---

ERROR TO THE  
SUPREME COURT OF  
THE TERRITORY OF  
HAWAII.

---

BRIEF FOR DEFENDANT-IN-ERROR

---

HENRY HOLMES,

CLARENCE H. OLSON,

PAUL R. BARTLETT,

Attorneys for Defendant-in-Error.

Filed this ..... day of ....., 1916.

F. D. MONCKTON, Clerk

By ....., Deputy Clerk.

MAY 17 1916

---

---

F. D. Monckton,



# In the United States Circuit Court of Appeals for the Ninth Circuit

No. 2748

---

COUNTY OF HAWAII,  
Plaintiff-in-Error,

vs.

HALAWA PLANTATION,  
LIMITED, a CORPORATION,  
Defendant-in-Error.

---

ERROR TO THE  
SUPREME COURT OF  
THE TERRITORY OF  
HAWAII.

## BRIEF FOR DEFENDANT-IN-ERROR

This action was originally instituted by the defendant-in-error, the Halawa Plantation, Limited, an Hawaiian corporation, in the Circuit Court of the Third Judicial Circuit of the Territory of Hawaii against the County of Hawaii, plaintiff-in-error herein, to recover damages for loss sustained by reason of the burning of a field of sugar cane belonging to the defendant-in-error, the complaint alleging that certain road laborers in the employ of the county while engaged in doing certain work on a county road, negligently set fire to a pile of rubbish on the road in the vicinity of the cane field, which spread to the cane field, thus causing the loss to defendant-in-error.

That the road was a county road under the juris-

diction of the county, that the fire in question was started by road laborers in the employ of the plaintiff-in-error engaged in road work on the road, that the fire so started escaped from the rubbish pile to the premises adjoining the road and thence to the cane field, thus causing the damage and loss set forth in the complaint are facts established by the evidence without any contravening proof. Furthermore, that the laborers were guilty of negligence in the premises is established by the verdict of the jury, and no error is claimed by the plaintiff-in-error herein which in any way affects this finding of the jury.

The jury found a verdict for the defendant-in-error in the sum of \$11,727.79, and judgment was rendered thereon and affirmed on Writ of Error by the Supreme Court of the Territory.

On this Writ of Error to the Supreme Court of the Territory of Hawaii, the plaintiff-in-error, the County of Hawaii, contends:

*First:* That the Supreme Court of the Territory of Hawaii erred in affirming, on Writ of Error, the judgment of the trial Court.

*Second:* That the Supreme Court of the Territory of Hawaii erred in holding that no error had been committed by the trial Court in overruling the defendant's (plaintiff-in-error herein) demurrer to the complaint.

*Third:* That the Supreme Court of the Territory of Hawaii erred in holding that no error had been committed by the trial Court in refusing to give de-



fendant's fifth, sixth and seventh requested instructions bearing upon defendant's claim of non-liability on the ground of contributory negligence upon the part of the plaintiff.

The assignments of error, therefore, actually present but two questions for the consideration of this Court, and the plaintiff's-in-error contention in this regard may be summarized as follows :

A. That the County of Hawaii as a matter of law is not subject to civil liability for tort.

B. That error was committed in refusing to instruct the jury on the question of contributory negligence on the part of the plaintiff below, defendant-in-error herein, on the ground that because it appeared from the evidence that an intervening unused strip of land was shown by the evidence to be covered more or less by dry vegetation and rubbish extending from the road where the fire was started to the cane field, the jury should have been permitted to determine whether or not the plaintiff below was guilty of contributory negligence in failing to have cleared the strip in question from the inflammable vegetation and rubbish.

#### CONTENTION OF DEFENDANT-IN-ERROR.

These assignments of error will be dealt with in the foregoing order, it being the contention of this defendant-in-error, the Halawa Plantation, Limited, that it is a settled rule of law in the Territory of Hawaii that a regularly incorporated county organi-

zation, such as is the County of Hawaii, is liable for the tortious acts of its servants and employees for the same reason and in the same degree that a municipal corporation is liable to respond in damages for similar defaults upon the part of its servants or employees, and further, admitting that there is a conflict in authority as to the liability of counties for tort, and that a certain degree of exemption is accorded to subdivisions of the state, of the kind referred to in the brief of plaintiff-in-error as quasi corporations, this doctrine of exemption from legal liability has no application to a fully incorporated and empowered political subdivision, as is the County of Hawaii.

It is further contended by this defendant-in-error that this Court will attach due and controlling weight to the fact that this question has been settled in a careful and searching opinion of the Supreme Court of Hawaii in an earlier case than the one now at Bar, on a set of facts that permitted a precisely similar application of the principle contended for here, and establishing a rule of law in Hawaii.

It is further contended by this defendant-in-error that no error was committed by the Supreme Court of Hawaii in its finding that the trial Court did not err in refusing to give the instructions on contributory negligence asked for by the plaintiff-in-error, the County of Hawaii, on the general ground that the evidence in the cause did not warrant the trial

Court in giving the jury instructions upon contributory negligence.

### ARGUMENT.

THE COUNTY OF HAWAII, BEING INCORPORATED UNDER ACT 39 OF THE SESSION LAWS OF THE TERRITORY OF HAWAII FOR THE YEAR 1905 AND EMPOWERED THEREUNDER TO SUE AND BE SUED IS LIABLE FOR THE ADMITTED NEGLIGENCE OF ITS SERVANTS IN THE CASE AT BAR.

The County of Hawaii, the plaintiff-in-error, was created and organized under Act 39 of the Session Laws of the Territory of Hawaii for the year 1905 entitled "An Act Creating Counties in the Territory of Hawaii and Providing for the Government Thereof," with full powers to sue and be sued, and to appear at Courts of law and equity in all respects as if it were a natural person.

Chapter 4 of Act 39 of the Territorial Session Laws of 1905, by which county government was organized as now existing in the Territory, provides as follows:

#### "GENERAL POWERS, LIABILITIES AND LIMITATIONS OF COUNTIES.

"Section 9. Each County shall have the following powers and be subject to the following liabilities and limitations:

1. To sue and be sued in its corporate name;
2. To purchase and otherwise acquire, take on

lease and hold real and personal property within its defined boundaries and to manage and dispose of the same as the interests of the inhabitants thereof may require;

3. To construct, purchase, take on lease or otherwise acquire buildings for County purposes, sewers, pumping stations, water works, including reservoirs, wells, pipe lines and other conduits for distributing water to the public, lighting plants, apparatus and appliances for lighting streets and public buildings; to acquire and maintain apparatus for extinguishing fires; to open, construct, maintain and close up public streets, highways, roads, alleys, trails and bridges within its boundaries, but no new street, highway, road or bridge shall be constructed without the location, grade and method of and material to be used in the construction of the same shall first be approved by the Superintendent of Public Works;

3a. To collect rates for water supplied by or from such pumping stations and water works; and for the use of sewers;

4. To make contracts and to do all things necessary and proper to carry into execution the foregoing powers and all other powers vested in said County or in any officer thereof;

5. No County shall in any manner give or loan its credit to or in aid of any person or corporation and any indebtedness or liability incurred contrary to this provision shall be void;

6. No contract involving an expenditure of public funds amounting to Five Hundred Dollars or more shall be awarded except to the lowest bidder after public advertisement for tenders, and no public work or requisition for material therefor shall be divided or parceled out for the purpose of evading the provisions of this Section and no new work involving the expenditure of Five Hundred (500) Dollars or more shall be done except by contract as above set forth; but the provision of this Section shall not be applicable to road work;



7. All contracts, authorizations, allowances, payments and liabilities entered into, granted, made or incurred in violation of this Act shall be void and shall never be a basis of a claim against the County;

8. Each of said Counties shall, for the purposes and objects of this Act, be a body corporate and politic and as such shall have all the powers and authority by this Act prescribed, the same to be vested in and be exercised by a Board of Supervisors of the County, as hereinafter provided. The duration and succession of such Counties shall be in perpetuity or until otherwise provided by law."

These provisions of the law, it is submitted, indicate that it was the intention of the Legislature to endow the County of Hawaii with full corporate power and responsibility. And a reading of the relevant parts of the Act as above set forth show that this intention of the Legislature was expressly carried out.

The liability of the County of Hawaii for injuries caused by the tort of a servant in its employ was before the Supreme Court of the Territory in the case of *Matsumura vs. the County of Hawaii*, reported in Volume 19 of the Hawaiian Reports at page 18 and reaffirmed in the same case in a later decision reported in the same Volume at page 496.

After an exhaustive and searching consideration of the authorities, from the leading case of *Russell vs. The Men of Devon*, 2 Term. Rep. 667, to the later decisions, the Supreme Court reached the conclusion that an incorporated county with the express powers possessed by the County of Hawaii is to be held liable

for the tort of its servant and gave judgment accordingly.

The attention of this Court is particularly directed to the careful analysis of the cases by Mr. Justice Ballou and his pointing out the erroneous application of fundamental principles that accompanied a misinterpretation of the real purport of the decision in *Russell vs. The Men of Devon*. This misapprehension is well illustrated by the citation in the brief of plaintiff-in-error, at pages 14-15 thereof, of an extract from Addison on Torts, reading as follows:

“A plainly marked distinction is made and should be observed between municipal corporations, as in incorporated villages, towns and cities, and those other organizations, such as townships, counties, school districts and the like, which are established without any express charter or act of incorporation, and clothed with but limited powers. These latter political subdivisions are called quasi corporations and the general rule of law is now well settled that no action at law can be maintained against a corporation of this class by a private person, for their neglect of public duty unless such neglect of action is expressly given by statute.”

Counsel for plaintiff-in-error states that the foregoing extract clearly points out the distinction, i. e., the exemption of a county from legal liability when a municipal corporation would be held to respond in damages for a similar tortious act of a servant. But it is clear that this selection from the text writer is not a happy one so far as supporting any contention of the plaintiff-in-error is concerned. The text

writer states that the distinction is between municipal corporations "and those other organizations, such as townships, counties, school districts and the like, *which are established without any express charter or act of incorporation. . . .*"

It seems unnecessary to observe that the County of Hawaii cannot be included in the author's classification of "quasi corporations," since it has its political existence by virtue of an express act of incorporation, and therefore, under the author's classification, the County of Hawaii is not such a "quasi corporation" as would be exempted from liability to a private person.

The case of *Eastman vs. Clackmas County*, 32 Federal Reporter, 24, points out the error of applying the rule of *Russell vs. The Men of Devon* to county forms of government in the United States. In the course of its decision the Court says:

"In *Russell vs. Devon Co.*, 2 Term. R. 667 (tempus 1788), it was held in the King's Bench that an action would not lie by an individual against the inhabitants of a county, for an injury sustained by reason of a bridge being out of repair, which was chargeable to the county. The decision of the Court was placed by Lord Kenyon on the ground that the inhabitants of a county were not a corporation, and had no corporate fund out of which satisfaction of a judgment could be made; that if the action was allowed, and the plaintiff had judgment, it might be satisfied out of the property of one of the men of Devon, and the result would be 'an infinity of actions' among the defendants for contribution. It had no board or court which stood for the inhabitants and adminis-

tered their local affairs. It had no power of taxation, and therefore had no corporate fund. It was merely a convenient division of the kingdom, comprising a number of quasi corporations, such as parishes, hundreds, or wapentakes, for judicial and representative purposes, in which the king, in his executive character, was represented by the vicecomes, or sheriff, on whom, in process of time, the civil administration was almost wholly devolved." 1 Bl. Comm., 116, 339; Whart. Law Dict. "County."

"The duty of keeping the highways, including the bridges thereon, in repair, devolved on the parishes in which they were. It was accomplished by means of a tax on the property and persons of the parish, paid either in labor or money, and applied under the direction of the surveyor of the ways. By the act of 22 Hen. VIII C. 5, this burden, in the case of bridges outside of any town, was devolved on the county at large; the justices of the county, or any three of them, being authorized to cause the repairs to be made at the expense of the inhabitants thereof; and this undoubtedly was the condition of the bridge in *Russell vs. Devon Co.* The inhabitants of the county had no authority to repair the bridge, or to raise means to do it with, any more than the inhabitants of one of our ward districts. They were only bound to contribute labor or money for that purpose, as they were required by the justices." 1 Bl. Comm., 357; Shear & R. Neg. Sec. 248.

"Following the case of *Russell vs. Devon Co.*, or the provisions of their own statutes, most of the American Courts have held that a county is not liable in damages for an injury sustained by anyone in consequence of failing to keep in repair a highway or bridge, while they have been generally agreed that a town incorporated under a special statute or charter, with authority over the streets and bridges within its limits, and the power to raise money by taxation for that purpose is so liable, unless otherwise



provided by statute." Dill. Mun. Corp. (2nd Ed.) Sec. 785; *Rankin vs. Buckman*, 9 Or. 253.

"The reason given for this distinction—that the inhabitants of a town incorporated under a special statute consent thereto, while a county exists, without the consent of its inhabitants, simply as a subdivision of the state—shows that it is a distinction without any substantial difference. . . ."

"In Iowa, Maryland, Indiana and Pennsylvania, the counties or townships charged with the duty of maintaining highways, and provided with the means of doing so, are held liable for injuries resulting from neglect in this respect." *Brown vs. Jefferson Co.*, 16 Iowa, 339; *Baltimore Co. vs. Baxter*, 44 Md. 1; *House vs. Commissioners*, 60 Ind. 580; *Dean vs. Township*, 5 Watts & S. 545; *Makanoy vs. Scholly*, 84 Pa. St. 136.

"And the modern English local boards and trustees, that are charged with the care and maintenance of highways and provided with the means of raising funds for the purpose, are now held liable, in their corporate capacity, for an injury caused by their negligence or that of their servants." *Trustees vs. Gibbs*, L. R. 1 H. L. 93.

After showing that the county had direct control over the wards through the instrumentality of the county Court; that it could assess and collect taxes for ward purposes through its agent, the ward supervisor, and had express authority for the erection and repair of bridges, the Court concludes:

"Upon this state of the obligation and power of the county, it is liable, in my judgment, for an injury sustained by anyone in consequence of its failure to keep a highway or bridge in reasonable repair; and, on principle, the common law will furnish

a remedy therefor as in the case of an incorporated town."

In other words, the Federal Court held that the nature of the county organization was the proper basis for determining its liability under the rule laid down in *Russell vs. Devon* and that it was clearly unsound to disregard the actual nature of the political subdivision and grant it an exemption from proper legal liability simply because of its being designated a "county," although possessing many of the powers and centralized responsibility of a municipal corporation.

This actual recognition of the true status of the plaintiff-in-error and its consequential liability for the tortious act of its servant is, of course, the underlying basis for the decision of the Supreme Court of Hawaii in the Matsumura case, cited supra, the precedent of which the Supreme Court of Hawaii applied in holding that the rule of liability of a Territorial county was established under the circumstances involved in the case at Bar.

This holding of the highest Court of Hawaii on two separate occasions, which established the law in the Territory, and which, it is submitted should be accorded controlling weight by this Court, is supported in a well reasoned consideration of the question in Thompson on Negligence, at page 618, where the author says:

"Where, therefore, counties are erected into corporations, provided with a corporate fund, or the

power of raising it, and invested with the care of highways and bridges, the reason of the rule ceases, and the rule ought to fall with it; they should stand upon the same footing in this regard as chartered cities. Notwithstanding the doctrine of *Reardon vs. St. Louis County*, the Supreme Court of Missouri lately held that a county was liable in a civil action for the negligence of a contractor, over whose work it reserved superintendence and control, with power to discharge his employees, in digging a ditch in such a careless manner that one of the employees of such contractor was killed in it. The case proceeds upon the idea that the rule that counties being political subdivisions of the state, are not liable for the laches or misconduct of their servants, has no application to a neglect of those obligations incurred by counties when special duties are imposed on them with their consent, express or implied, or when a special authority is conferred on them at their request. (*Hannon vs. St. Louis County*, 62 Mo. 313.) In this respect it follows the language of Metcalf, J., in *Bigelow vs. Randolph*, (14 Gray, 543,) qualifying *Mower vs. Leicester*, (9 Mass. 247). There is an infirmity in the case, consisting in the fact that the negligence was that of a *contractor*, and the deceased was his *employee*."

"The doctrine of this case, in so far as it makes counties liable for the torts of their employees is a sound one. The ground on which Lord Kenyon placed his judgment in *Russell vs. The Men of Devon*—that counties have no corporate fund, and that judgments for damages against them would hence have to be levied off the property of any one or more of the individual inhabitants—is not sound when applied to counties in Missouri, Illinois and other Western states. These counties are political bodies, having a common administrative board, elected by the votes of the county, by which the business of the county is transacted. Through this board the county contracts and is contracted with, sues and is sued.

Many counties issue negotiable securities in large amounts. Their administrative boards possess a limited power of taxation for county purposes. In these respects no substantial difference is perceived to exist between them and chartered municipal corporations. The argument that liability should attach to the latter, and not to the former, because the latter are supposed to accept their charters voluntarily, while the duties and obligations annexed to the former are imposed on them involuntarily, is based on an assumption, in most cases, and is, even where the premises are correct, fantastical and destitute of sense. There is no sound distinction between the sanction of an obligation voluntarily assumed by a public body and that of an obligation which the Legislature, in the due exercise of its powers, has imposed upon it. The reasoning of Lord Kenyon, that to give a private action against a county for damages sustained by reason of a failure to repair its highways would lead to a multiplicity of suits to enforce contribution from other inhabitants, has no application to our system. Such a judgment would, with us, be enforced by mandamus against the County Court, or other administrative board of the county, compelling them to levy a tax to pay it."

This reasoning, it is submitted, applies with decisive force in sustaining the liability of the County of Hawaii in the case at Bar. The quoted provisions of Act 39 of the Territorial Session Laws for 1905 show that the nature of the full corporate organization of the County of Hawaii bring it, not only within the reasoning of Thompson in his consideration of the county organizations of the Western states, but in fact show the plaintiff-in-error to possess even a greater degree of centralized power and responsibility than is usually vested in the counties which the



author had in mind in the course of his careful analysis.

It should be noted that under the provisions of Section 9 of Act 39 of the Session Laws of 1905 the plaintiff-in-error is granted the power of maintaining highways, yet the duty of highway administration is not specifically enjoined and it follows therefore, that no action would lie for non-feasance in failing to take affirmative action under the grant of power given to the County of Hawaii by Section 9. And it is equally clear that in the case of a municipality undertaking a work not specifically enjoined and which it is not required to perform by virtue of its organization, and in the performance thereof an individual suffers damage by reason of the work being done negligently, that the individual may have an action against the municipality.

5 Thompson, Negligence, Sec. 5788.

This proposition of law is firmly established and applies directly to the facts and circumstances involved in the case at Bar. No mandatory duty was imposed upon the County of Hawaii to undertake the work, the conceded negligence in the performance of which resulted in the damage to defendant's-in-error property. It was work left entirely to the discretion and control of the agents and servants of the County of Hawaii and therefore the rule of liability is properly applicable, in conjunction with the rule of local law, supported by authority, that a county organization of the type of the County of Hawaii is liable for

the negligent acts of a servant, illustrated by the facts of the case at Bar.

In the brief of plaintiff-in-error an attempt is made to distinguish the rule of local law, established in *Matsumura vs. County of Hawaii*, supra, and deny its application herein. It is submitted that the Matsumura case is precisely in point, as was held by the Supreme Court of Hawaii, and that the effort of plaintiff-in-error to escape the conclusive effect of the reasoning of that decision in the case at Bar is entirely unavailing.

In the Matsumura case the Supreme Court of Hawaii found that it was "not a case of negligent failure to repair a public work but lack of due care in the execution of the work ordered by the corporation. 2 Cooley Torts. 3rd ed. 741."

This language, it is submitted, is clearly applicable to the facts of the case at Bar, and no reasonable distinction is possible to support the contention of the plaintiff-in-error.

The decision in the Matsumura case continues, at page 22 of Volume 19 of the Hawaii Reports:

"It is not the act of an elective or public officer of whom the relation of master and servant may be doubtful but of a servant selected by the supervisors themselves. 5 Thompson, Negligence, Sec. 5792. It is not the act of the county in planning a public work (*Johnson v. District of Columbia*, 118 U. S. 19), but in the ministerial function of carrying out that plan. 5 Thompson, Negligence, Sec. 5794. The only possible exemption applicable seems to be that taken in those cases which draw a distinction between the gov-

ernmental and corporate functions of a municipality (*Moffitt v. Asheville*, 103 N. C. 237). The typical case is that of nonfeasance in the face of a duty imposed upon the corporation, and it is upon this class of cases, which includes actions for injuries resulting from the negligent failure to repair highways, that there is the greatest conflict of authority. The leading cases denying liability upon this are *Hill v. Boston*, 122 Mass. 344, and *Detroit v. Blackeby*, 21 Mich. 84. Opposed to these are the cases represented by *Barnes v. District of Columbia*, 91 U. S. 540, repeatedly followed (*District of Columbia v. Woodbury*, 136 U. S. 450) and cited with approval even when subsequent decisions have been controlled by local or admiralty law. *Detroit v. Osborne*, 135 U. S. 492; *Workman v. New York City*, 179 U. S. 552, 574.

"We need not enter into a discussion of these authorities, however, nor even into those holding that the repair of highways is properly classed as a corporate and not a governmental function (*Coburn v. San Mateo County*, 75 Fed. 520; *Barree v. City of Cape Girardeau*, 197 Mo. 382; 95 S. W. 330), because we are of the opinion that under no proper conception of the doctrine of municipal immunity in the performance of governmental functions can it be held to include immunity for negligence resulting in the direct invasion of plaintiff's private right as an adjacent land owner.

"Before examining the authorities we may restate the question from a different point of view. It will be observed that the injury in any case may result from nonfeasance or misfeasance and that the latter class may be again divided so that we find injuries resulting from (1) nonfeasance, (2) the negligent performance of the act, (3) the necessary consequence of the act and (4) intentional trespass. Each of these four may in turn result in the invasion of (a) public or (b) private rights. When we take into consideration the fact that almost every case of negligence may be viewed indifferently either as omission

or as commission (1 Street, Foundations Legal Liability, 86), it is not strange that there is confusion in the application of the theory of governmental immunity among these classes of cases."

The Court then states that:

" . . . the case at Bar is concerned only with the invasion of a private right through misfeasance of the defendant's agent either as a necessary result of his wrongful act or because of the negligent manner in which it was done. Upon either theory a municipal corporation would be liable."

It seems unnecessary to show the application of this language to the case at Bar. The private right of the defendant-in-error was invaded through the fire that communicated to its cane field as the result of the negligent act of the servant of plaintiff-in-error.

As is said in the case of *Hill vs. Boston*, 122 Mass.:

"In such cases, the cause of action is not neglect in the performance of a corporate duty, rendering a public work unfit for the purposes for which it was intended, but is the doing of a wrongful act, causing a direct injury to the property of another, outside the limits of public works."

In considering the doctrine of exemption as applied to governmental work Chief Justice Shaw said:

"But this presupposes that the public work thus authorized will be executed in a reasonably proper and skilful manner, with a just regard to the rights of private owners of estate. If done otherwise, the damage is not necessarily incident to the accomplishment of the public object, but to the improper and



unskilful manner of doing it. Such damage to private property is not warranted by the authority under color of which it is done, and is not justifiable by it. It is unlawful, and a wrong, for the redress of which an action of tort will lie." *Perry vs. City of Worcester*, 6 Gray 544.

The reason for holding a municipal corporation liable for private injuries sustained in the execution of public work is set forth in *Eastman vs. Meredith*, 36 N. H. The Court says :

"The plaintiff, in cases of this character, does not recover on the ground that he has been denied any public right which the corporation owed to him as a citizen of the town, or because he has suffered an injury in the exercise of a public right, from neglect of the town to perform a public duty. The corporation being authorized by law to execute the work, if, in their manner of doing it, they cause a private injury, they are answerable in the same way and on the same principle as an individual who injures another by the wrongful manner in which he performs an act lawful in itself. It has been sometimes made a question, whether in the particular case the corporation were liable as principals for the conduct of those who performed the work on their account; but where a work is once conceded to be done by the corporation, it would seem to be clear, on authority and general principles, that a corporation, public or private, must be held liable like an individual for injuries caused by negligence in the process of executing the work." *Eastman vs. Meredith*, 36 N. H. 284, 295.

It is submitted that it is clear that a municipal corporation would be undeniably liable in tort under circumstances similar to those present in the case at

Bar, and that the County of Hawaii, expressly created a corporation empowered to sue and be sued, cannot escape liability on an assumption, which, in the language of Thompson is "in most cases, even where the premises are correct, fantastical and destitute of sense."

THE LIABILITY OF THE COUNTY IN CASES  
SIMILAR TO THE ONE AT BAR, BEING AN  
ESTABLISHED RULE OF LOCAL LAW IN  
HAWAII, THIS COURT WILL NOT SET  
THE RULE ASIDE.

It is submitted that the rule of local law, holding the County of Hawaii to a legal liability, and regarded as a precedent binding on the Supreme Court of Hawaii in that Court's decision in the case at Bar, should be accorded controlling weight by this Court and, therefore, the judgment of the Supreme Court of Hawaii should be affirmed.

The authorities are numerous that the character and extent of the powers and liabilities of the political bodies or municipal corporations of a state are in general questions of local law, as to which the decisions of the highest Courts of the jurisdiction are authoritative in the Federal Courts.

*Johnson vs. St. Louis*, 96 C. C. A. 617, 172  
Fed. 31.

*Goodrich vs. Chicago*, 4 Biss., 18 Fed. Cas. No.  
5, 542.

So, it has been held that state decisions will be followed as to the authority of a public board and as to the contracts of counties or school districts.

*Hoyt vs. Gleason*, 65 Fed. 685.

*Thompson vs. Searcy County*, 6 C. C. A. 674,  
57 Fed. 1030.

The questions of municipal liability for defects or obstructions in the street and liability for the torts of officers or employees, though not involving a statute, and turning upon the distinction between governmental and private functions, have been regarded as local questions, as to which the decisions of the Courts of the local jurisdiction are controlling. And this, of course, is true, a fortiori, if the decisions of the state Court rest upon a statute.

*Detroit vs. Osborne*, 34 Fed. 260, 10 Sup. Ct.  
Rep. 1012.

*Blaylock vs. Muskogee*, 54 C. C. A. 639, 117  
Fed. 125.

*Denver vs. Porter*, 61 C. C. A. 168, 126 Fed.  
288.

*Merrill vs. Portland*, 4 Cliff, 138, Fed. Cas. No.  
9470.

THERE WAS NO EVIDENCE TENDING TO  
SHOW CONTRIBUTORY NEGLIGENCE  
AND THEREFORE IT WAS NOT ERROR  
FOR THE TRIAL COURT TO REFUSE TO  
INSTRUCT THE JURY THEREON.

It appeared incidentally in various parts of the

testimony in the trial Court, that there was a rather steep pali of a width of about two hundred and fifty feet between the road and the cane field, covered with lauhala trees, the leaves of which were more or less dry, dry leaves on the ground, and dry grass and weeds, and that the weather had been dry for two or three months.

In view of this testimony, the plaintiff-in-error contends that the trial Court should have left it to the jury to determine whether or not the defendant-in-error was negligent in failing to have cleared the dry vegetation, rubbish, and leaves away, so that the fire in question could not have reached the cane field. There being no other evidence whatever in the record upon which a contention of contributory negligence could be based, the trial Court refused to give any instruction upon contributory negligence.

This contention upon the part of the plaintiff-in-error is clearly unsound on either of two grounds.

In the first place, the combustible material in question had not been placed upon the premises by the defendant-in-error, but was natural vegetation that had grown thereon. Furthermore, the defendant-in-error did not become cognizant of the fire negligently started by the county employees, until it was too late to remove or attempt to remove this combustible material, and therefore could not be charged with the affirmative duty of doing what it could to avert a known and impending danger.

In the second place, even if the defendant-in-error



could be said to have been guilty of negligence in failing to clear the strip in question of combustible material in anticipation of fire such as the one in question, the rule known as the "last clear chance rule," which has been fully recognized and established by the United States Supreme Court, would eliminate any question of contributory negligence in this case.

We shall deal with these two points separately.

#### NO NEGLIGENCE SHOWN.

It is to be borne clearly in mind that the strip of land in question which lay between the road and the cane field, was an uncultivated strip of land in its natural state, and that the combustible material which the county claims should have been removed in anticipation of fires, consisted of natural growths of vegetation, such as grass and weeds, and the bushes and trees and leaves therefrom and thereon. In the second place, there was no extremely hazardous, or even hazardous, use being made of any of the premises adjoining or in the vicinity of the strip in question, from which fires should have been apprehended, such as a railway.

Under these circumstances, we submit that no case can be found in the books, which can be regarded as an authority for the contention that any duty was placed upon the defendant-in-error to take any precaution against fire by removing the combustible material in whole or in part.

In the case of *Erd vs. C. & N. W. R. Co.*, 41 Wis. 65 at 66, the Wisconsin Supreme Court expressly declares as follows:

“The fact that there was combustible material on the plaintiff’s land adjoining the tract, did not constitute negligence on his part.”

See also the following cases which amply bear out our contention:

*Box vs. Kelso*, 5 Wash., 360, at 364-365;

*Tacoma, etc., Co. vs. Tacoma*, 1 Wash. 12;

*Fraler vs. Seers Union Water Co.*, 12 Cal., 556 at 559;

*Alfern vs. Churchill*, 53 Mich., 607, 19 N. W. 549;

*Cook vs. Champlain, etc., Co.*, 1 Denio (N. Y.), 91 at 99-100;

*Yik Hon vs. Spring Valley Water Works*, 65 Cal. 619, 4 Pac. 666.

In the case last cited at page 620 of the state report, the Court says:

“The right of a man to make free use of his property is not to be curtailed by the fear that his neighbor will make a negligent use of his.”

We do not dispute the rule of law that once a force is set in motion, even though due to the negligence of another, which becomes known to the party complaining before the injury to him is done and which he as a reasonable man should have known was threatening his property, the duty is cast upon him to take all reasonable means, even though involving affirmative action on his part, to avert the threatened

injury, and if he fails to take such action, he is guilty of contributory negligence and cannot recover from the person who negligently set the force in action. *But* that rule of law has no application to the case at Bar. The testimony, without contradiction, shows that after the fire was started by the county employees, nothing was left undone by the defendant-in-error to save the field of cane or to lessen the injury thereto.

On the other hand, the rule of law cannot be questioned, that with regard to possible dangers resulting from the negligence of others, but which have not to the knowledge of the party injured actually been brought into action, no duty is cast upon the party injured to guard against or avert the same. This rule is especially emphasized when applied to the use made of one's own property.

In the railway cases the Courts have recognized that an operating railway is constantly an actually existing source of danger from fire, because it is well known that railroad engines may be expected to emit sparks at any time. Therefore in such a case, it is as if a fire were already started moving in the direction of the property of the injured party. However, even in the case of a railway, thus constituting an actually existing and constantly threatening danger to adjoining property, no Court has held that the owner of the adjoining property is obliged to anticipate fire and to avoid its consequences, keep his land cleared of natural vegetation.

In the case at bar, the intervening strip of land was in a state of nature. There was no hazardous enterprise being carried on in its proximity. The owner thereof had the right to assume that the county employees working on the roads would exercise care in doing their work, and could not be called upon to anticipate that they would negligently start a fire within a few feet of the premises, with the wind blowing in that direction. It had the right to assume that rubbish on the roads would be disposed of by the county in a lawful, prudent and careful manner, in which case the damage complained of would not have occurred.

To hold otherwise, this Court would virtually declare that every owner of land wherever adjoining a public road, highway or byway, is in duty bound to keep the same clear of any vegetation whatever that is capable of conveying fire on account of its combustibility. Further than that, no crop, whether sugar cane or any other crop capable of ignition, could be grown next to a highway without casting upon the owner the charge of contributory negligence.

In the case of *Cook vs. Champlain Transportation Company*, 1 Denio 90, the Court indicated the inherent limitations as to applying the doctrine of contributory negligence:

“Another ground for non-suit was urged; the injury done was said to be in part at least attributable to the negligence of the plaintiffs themselves, in voluntarily placing their property in an exposed



position, and therefore the law would afford no redress. On the argument at bar, this was strenuously insisted as fatal obstacle to any recovery.

"The general principle is certainly well established, that if the plaintiffs' wrongful act or negligence concurs with that of the defendant in producing the injury, the law will not aid him in obtaining redress. This principle has a broad and extended application, but nevertheless admits of exceptions and qualifications. It is unnecessary, however, to state the exceptions for the general principle does not, as I think, reach this case. *The property destroyed was in an exposed and hazardous position, and therefore in more than ordinary danger from mere accidental fires. This risk the plaintiffs assumed,* BUT NOT THE RISK OF ANOTHER'S NEGLIGENCE. They were on their own land, and free to use it in any manner and for any purpose which was lawful. As was correctly observed by the circuit judge, 'the plaintiffs had as good a right to erect their mill on the shore of the lake as the defendant has to sail on its bosom.' It would be a startling principle indeed, that a building placed in an exposed position, on one's land, is beyond the protection of the law; and yet it comes to this result upon the argument of this case. A landowner builds immediately on the line of a railroad, as he has an unquestionable right to do; *it may be an act of great imprudence, but in no sense is it illegal. Is he remediless if his house is set on fire by the sheer negligence of an engineer in conducting his engine over the railway?* There must be some wrongful act or culpable negligence on the part of the plaintiffs to bar them on this principle; and neither can be affirmed of any one for simply occupying a position of more or less exposure on his own premises."

Applied to the facts of the case at bar, the foregoing statement of the law clearly forecloses the con-

tention that there was any contributory negligence on the part of the plaintiff below.

The plaintiff-in-error cites the case of *Keese vs. C. N. & W. R. Co.*, 30 Iowa 78. This case, we submit, can be supported on one ground only, a ground which distinguishes the case from the case at bar, namely, that the existence of the defendant's railway and its use of the same with locomotives constituted an ever existent source of danger from fire, in other words that a railway in operation is a "seen" danger, just as much as if a fire were already started traveling in the direction of the plaintiff's property to his knowledge, and therefore the affirmative duty is cast upon the plaintiff to exercise reasonable care to protect his property being threatened. This element is recognized in the Wisconsin case of *Murphy vs. N. C. & W. R. Co.*, 45 Wis. 222, where the Court says:

"We see no reason why a man who recklessly and unnecessarily exposes his property to destruction by fire in the immediate vicinity of a railroad, *which from the necessity of the case must use the dangerous element of fire in carrying on its business*, should as a general rule be protected, if by the use of ordinary care he could have avoided its destruction. . . ."

In other words, cases of fires communicated from railway locomotives, and transmitted to the property destroyed by means of dry rubbish and vegetation on the plaintiff's land are classified with cases such as *Brown vs. Brooks*, 85 Wis. 290. The plaintiff in *Brown vs. Brooks* knew that the fire which eventually destroyed its property was raging and approaching

his property twenty-four hours before the damage was done. In the face of this known or "seen" danger, he failed to take any steps to protect his property therefrom. Of course, this failure constituted a fact which should have gone to the jury as tending to show contributory negligence. Likewise the hazardous character of a railway used by locomotives may very well be regarded as a "seen" danger or known danger.

However the case at bar is absolutely dissimilar. People are not constantly building bonfires on the public highways. By no stretch of a reasonable imagination, can the possibility of such fires being built be regarded as a "seen" danger. In other words there was nothing which should have warned the plaintiff below that such a fire would probably be built in the vicinity of its cane field. The evidence shows without contradiction that it did not in fact become cognizant of the fire until it had gone entirely beyond control.

We submit that there is not one particle of evidence in the record tending even to show that the plaintiff failed in anything in attempting to discover that the rubbish pile on the highway in question was to be fired or that there was such a fire after its ignition until it had gotten absolutely beyond control.

The only evidence being that the strip of land in question was left in its natural state, even though the natural vegetation thereon on account of its dry condition was combustible and capable of conveying

fire, and there being nothing in the nature of a hazardous use of enterprise carried on in its vicinity which caused the fire, there was nothing whatever even tending to show contributory negligence, and consequently the trial Court was justified in refusing to instruct the jury on that subject; and had it done so, would have been in error on account of the utter absence of evidence of contributory negligence.

### LAST CLEAR CHANCE RULE.

While we submit that it is clear that there was no evidence whatever tending to show contributory negligence on the part of the defendant-in-error, and are satisfied that this Court will not deem it necessary to consider the rule of law about to be discussed, yet the case at bar comes so clearly within the so-called "last clear chance rule" even if there was any contributory negligence, that this Court would be obliged to sustain the judgment below under that rule, and we therefore proceed to show its applicability here.

A leading case on this subject is the case of *Davies vs. Mann*, 10 M. & W. 546, which is mentioned in the brief for the plaintiff-in-error.

The facts were that the plaintiff had negligently left his donkey tethered on the highway. The defendant in driving on the highway negligently ran over the donkey, causing the damage on account of which the plaintiff brought the suit.

The Court held that notwithstanding the negligence of the plaintiff, the defendant was liable.



This case has been the subject of considerable conflicting discussion, but we submit that it is clear that the difference of opinion regarding the case arises out of an element of uncertainty in the statement of the facts of the case, namely, the question whether or not the defendant actually became aware of the presence of the donkey in the road in time to avoid the collision, whereas in the case at bar there is no analogous uncertainty. Thompson on Negligence, Sec. 231, makes clear the uncertainty regarding the facts of the *Davies vs. Mann* case, and without qualification indorses the soundness of its decision *provided* the defendant became aware of the helpless condition of the donkey in sufficient time to avoid running over it.

In other words even though the plaintiff in tethering the donkey in the highway was guilty of negligence, the defendant's negligence at the later moment was sufficient to make him liable notwithstanding the plaintiff's negligence if as a matter of fact the defendant observed the condition of the plaintiff's donkey in such time that he could have, by the exercise of care, avoided the collision. Granting the existence of the last mentioned element, to-wit, the knowledge of the defendant of the condition of the plaintiff's property in time to avoid the injury, the defendant being absent and therefore unable to act in any attempt to avoid the injury when the plaintiff's negligence arose, there is no quarrel in any of the decided cases with the decision in *Davies vs.*

*Mann.* And, as the above mentioned quotation from Thompson on Negligence shows, that author agrees with the decision if the element in question existed.

The rule laid down in *Davies vs. Mann*, when explained as explained by Thompson, is clearly adopted by the United States Supreme Court.

*Inland, etc., Co. vs. Tolson*, 139 U. S. 551;

*Grand Trunk Ry. Co., Ives*, 144 U. S. 408 at 429.

The application of the rule to the case at Bar is clear. One Koolau was the small overseer, under Naipo, the district road supervisor, and in charge of the particular work of clearing the rubbish from the road and disposing of the same. (Tr., p. 49.) Koolau had been directed by the road supervisor, Naipo, to clear up the rubbish in question and he himself lighted the fire to the rubbish pile. (Tr., p. 52.) Koolau knew that the weather had been dry in the vicinity in question for a considerable time and that the vegetation on the strip of land between the road and the cane field was more or less dry. Not only this, but Koolau, before starting the fire to the rubbish pile, had thought of the possibility of the grass and rubbish on the hillside catching fire (Tr., p. 54) as well as the possibility of the cane field in question catching fire should the fire extend to the dry vegetation on the intervening strip of land (Tr. p. 74). Unfortunately for the county as well as the defendant in error, although Koolau realized the danger and knew the existing conditions, including a breeze blowing in the direction of the intervening

strip of the land and the cane field, he did not, according to the verdict of the jury, exercise sufficient care to prevent the happening of the disaster, the possibility of which he had affirmatively in mind.

On the other hand, according to all of the testimony, the defendant-in-error had no one in the vicinity at the time, and consequently it could take no steps to avert the injury, once the fire was started.

We have, therefore, an exact case for the application of the "last clear chance rule."

Even if the failure of the defendant-in-error to remove the dry vegetation between the cane field and the road constituted negligence on its part (which we, of course, dispute), the county, through its employees, being at the time actually aware of the dry condition of the vegetation adjoining the road as well as the existence of the cane field, and also of the breeze blowing in the direction of the cane field, at a time when there was no one in the vicinity representing the defendant-in-error to protect its property or avert the fire once it was started, started a fire in a negligent manner which caused the injury. In other words the active negligence of the county arose at a time when the negligence, if any, of the defendant-in-error was passive, at a time when the county was aware of the existing conditions on the property of the defendant-in-error and when the defendant-in-error was absent and in no position to avert the danger once the fire was started.

The case is perfectly simple. At the time the coun-

ty began the negligent operation and until the fire had gone beyond control, the defendant-in-error irrespective of any preceding lack of precaution, was absolutely helpless because it was not on the ground. The county, through its employees, found a known condition existing, that is to say, known to it, and nevertheless acted so negligently with respect to that condition, that the damage to the defendant-in-error resulted when it was powerless to do anything to avert the same.

In conclusion, it is submitted that it is clearly established that a municipal corporation would be held to a legal liability under the facts and circumstances existing in the case at Bar. The fact of negligence upon the part of plaintiff's-in-error servant, resulting directly in loss to defendant-in-error as an adjoining land owner, cannot be questioned. At the time that the negligent act was committed, the employees of the County of Hawaii were engaged in the performance of work not specifically enjoined upon the county, the assumption of highway control and development being a matter within the discretion of the constituted authorities of the county.

It has been shown that it is an established rule of local law in the Territory of Hawaii that the County of Hawaii is liable to respond in damages for injury caused to an individual occasioned by the negligent act of a county servant, and the nature of the powers and liabilities given to and imposed upon the county, together with the express provision that it may sue



and be sued, forbids its inclusion within any artificial classification for the purpose of construing therefrom an implied exemption from liability in the case at Bar, and this firmly established rule of local law should be given due and controlling weight by this Court.

That the doctrine of contributory negligence cannot be summoned to the aid of plaintiff-in-error has also been shown and, if the facts of the case did permit its application, plaintiff-in-error would nevertheless be precluded by the last clear chance rule.

We submit that the judgment of the Supreme Court of the Territory of Hawaii should be affirmed.

Respectfully submitted,

HENRY HOLMES,

CLARENCE H. OLSON,

PAUL R. BARTLETT,

Attorneys for Defendant-in-Error.

Dated May 6, 1916.

**ADDENDUM:** As pointed out by the Supreme Court of the Territory the Legislature has met in four regular sessions since the decision in the Matsumura case and has not amended the County Act to meet that decision (Record, p. 304). It has, however, amended the Act in numerous other respects (See, for instance Revised Laws of Hawaii 1915, Sections 1503, 1507-1517, 1519, 1527, 1531, 1534, 1565-1567, 1573). Under the circumstances the decision must be held to have received legislative sanction and is now clearly controlling, whether erroneous in principle or not.

26 Encyc. Law 167 and cases cited.

36 Cyc. 1143-4 and cases cited.



IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

---

COUNTY OF HAWAII,

*Plaintiff in Error,*

VS.

HALAWA PLANTATION, LIMITED  
(a corporation),

*Defendant in Error.*

**SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.**

---

W. H. SMITH,  
*Attorney for Plaintiff in Error.*

---

*Filed this*.....*day of May, 1916.*

*FRANK D. MONCKTON, Clerk.*

*By*.....*F. D. Monckton,*  
*Deputy Clerk.*





No. 2748

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

COUNTY OF HAWAII,

*Plaintiff in Error,*

vs.

HALAWA PLANTATION, LIMITED

(a corporation),

*Defendant in Error.*

## SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

The oral argument before this Court on behalf of plaintiff in error in the above-entitled matter, involved, so far as the question of liability of counties in Hawaii is concerned, the following contentions:

1. That the decision of the Supreme Court of Hawaii should not be accorded controlling weight in this Court in the case at bar.

2. That it has been established by an almost uniform line of decisions in the United States, that counties are not liable for the misfeasance of their officers or employees, nor for their nonfeasance, except where a duty has been specifically imposed.

The reason being that counties are but agents or instrumentalities of the State, or general government, created for its convenience and assistance.

3. That counties in Hawaii are essentially agents or instrumentalities of the territorial government and particularly susceptible to the foregoing reasons.

4. That even if counties in Hawaii are only municipal corporations proper, still the care of their highways is a strictly governmental function, and that even municipalities are not liable for injuries occurring in the performance of governmental, as distinguished from the exercise of corporate or local powers.

5. That the facts of the present case distinguish it from the Matsumura case, as shown in our original brief (pp. 13 et seq.) and Michigan cases there cited.

The first of the foregoing propositions was not touched upon in the original brief of plaintiff in error, as the argument in favor of the controlling effect of the Matsumura case, with the allied contention for the effect to be given to the alleged acquiescence of the Legislature in that decision, was first raised in the brief of defendant in error.

The nature of the Hawaiian county, as shown by the Organic Act, the County Act, and the expression of the Hawaiian courts, was but slightly touched upon in our original brief. It is understood that the scope of the supplemental brief is limited to these two phases of the discussion.

**FORCE OF MATSUMURA CASE.**

The facts of the Matsumura case are stated on page 12 of our original brief. The opinion in the Matsumura case embodies the following discussion:

1. Would a municipal corporation be liable upon the facts stated?

2. If a municipal corporation would be liable, is defendant exempt because it is a county?

These questions a majority of the Court answered as follows:

(a) A municipal corporation would be liable because the act complained of was a direct invasion of a private right and for such an invasion an action will lie whether the work was governmental or corporate.

(b) The attempted distinction between counties and municipalities proper, made by most courts, is without basis in principle or reason, having its roots in *Russel v. Men of Devon County*, a case not applicable to the modern county even when the latter is of the simplest corporate type.

To sustain the distinction, Courts later resorted to the argument that counties are governmental agencies, while municipal corporations proper are largely of local activity and use—a baseless distinction.

(c) Still less is the historical origin, or later development of the doctrine, applicable to Ha-

waiian counties, which bear little resemblance to the counties of the various States, and cannot upon examination of their functions be considered governmental agencies, so that the extension of immunity to Hawaii, would be merely a blind adherence to a principle which is itself erroneous and born of fallacy.

The brief of defendant in error (pp. 20 et seq.) maintains that this decision should be held of controlling effect, and cites a number of cases from the Federal Courts to sustain the contention. As stated in our oral argument, however, these cases have hardly the slightest application to the present case, but are concerned with the effect given by Federal Courts to the decisions of State Courts whose jurisdiction embraces the same territory.

For guidance in the case at bar we must go to a case like *Kealoha v. Castle*, 210 U. S. 149 (52 Lawyer's Edition, 998), which was in brief as follows:

The Supreme Court of Hawaii in 1880, long prior to annexation, had held that a statute legitimating children born out of wedlock, whose parents afterwards intermarried, did not apply to offspring of adulterous intercourse. Twenty-eight years after this, and long after annexation, the Supreme Court of Hawaii, followed this construction of the local statute, and the Supreme Court of the United States refused to disturb this construction, irrespective of the conflict among Courts upon the principles involved. But as to statutes



and decisions subsequent to annexation, the Court said:

“In the case of a law adopted by an organized territory of the United States at a time when it was subject to the control of Congress, the rule is that we will lean towards the interpretation of a local statute adopted by the local courts.”

This is probably the statement most applicable to the present matter to be found in the decisions of the Supreme Court of the United States on cases coming from the Territory of Hawaii. Others to which brief reference may be made are the following: The construction was sustained given by the Supreme Court of Hawaii to statutes relating to exceptions, and to the question whether an order upon determination of such exceptions was a final judgment for which a writ of error could be taken to the Supreme Court of the United States. Purely a question of statutes of local procedure.

*Cotton v. Hawaii*, 211 U. S. 162 (53 Lawyer's Ed. 131).

In the following case the Court held that it should give great weight to a decision of the Supreme Court of Hawaii concerning the powers of an earlier tribunal (the Land Commission of 1845) and involving obscure local history.

*Lewers & Cook v. Atcherly*, 222 U. S. 285 (56 Lawyer's Ed. 202).

The construction given by the Supreme Court of the Territory of Hawaii, to a will written in the

Hawaiian language, was sustained as against the construction given by the Federal Court of the Territory. Also a holding that former probate proceedings had been in order was sustained as being a matter peculiarly for local determination.

*Ii Est. v. Brown*, 235 U. S. 342 (59 Lawyer's Ed. 259).

In the following case it was held that the Federal Supreme Court will ordinarily defer to the rulings of the local Courts with respect to the validity under Hawaiian laws of a judgment of the Hawaiian Courts. The decision of the Supreme Court of Hawaii, however, was reversed on a proposition of general law.

*Kapiolani Est. v. Atcherly*, 238 U. S. 116 (59 Lawyer's Ed. 1229).

---

#### FAILURE OF LEGISLATURE TO ACT.

An addendum to the brief of defendant in error lays stress upon the inference drawn by the Supreme Court of Hawaii in its decision (Transcript of record, p. 304), to the failure of the Legislature to enact a statute adopting a rule different from that laid down in the *Matsumura* case. This introduces a question not free from difficulty, and brings us from a consideration of fact and positive law into the rather shadowy realm of inference. Defendant in error cites 26 A. & E. 167, which says:

“The Courts are extremely reluctant to reverse a decision construing a statute where the

construction has in any manner received the sanction of the Legislature. Where the amendment of the statute leaves unchanged a section of the statute, which has been construed by the Court of last resort in the State, it will be presumed that the Legislature in the new law, intended to adopt the construction placed upon this section by the Court. Also a decision will be adhered to where a Legislature in revising the statute laws of the State, has not seen fit to change the statute construed."

For example, in *Grubbs v. State*, 24 Ind. 295, which was a prosecution for violating an act regulating foreign insurance companies, which had previously been held void for various reasons and not subsequently corrected by the Legislature through several sessions, the Court said:

"We ought to proceed with great caution in reversing opinions hereofore pronounced by this Court and received and acted upon as settling the law, and especially where a rule of property would be overturned, and that would be made criminal which before had been adjudged lawful."

None of which reasons are applicable to the case at bar.

In the following case the Court held that a construction placed by the Court upon the words "actually settled" in a statute relating to settlement on school lands, should be followed, the Legislature having subsequently re-enacted the statute with the same words.

*Hall v. White*, 94 Tex. 452.

(Which also involves a set of facts not applicable to the present case.)

A similar principle was adhered to in limiting the liability of an administrator's bond in *Flannery v. Givens, Administrator*, 52 S. W. 962.

These cases involve some affirmative act of the Legislature, conformable to the decisions of the Courts, but we have to do in the present case with a failure upon the part of the Legislature to act.

In a note to 36 Cyc. 1143 (referred to by defendant in error in addendum to brief), the case of *McChesny v. Hagar* is cited to the effect that acquiescence by the Legislature in a construction by the executive or judiciary, is evidence that such construction is in accordance with the legislative intent. This was a case in which a previous judicial construction of a statute providing for salary of a public officer, had not resulted in any legislative action changing the statute although four Legislatures had met. It was held that if the Legislature had not intended this construction originally, it would have so declared itself and specifically have granted the officer the salary now claimed.

The Court in the above case may have been correct in arriving at the conclusion that the later Legislature did not intend to give the officer any more salary than the Court had construed the law as giving him, but we do not admit that one Legislature can interpret what another Legislature meant, any more than a witness on the stand can tell what another man meant when the latter's words are ambiguous.



In *Bingham v. Board of Supervisors of Winona County*, 8 Minn. 390, a question of fees claimed by a county treasurer, it was contended that the Legislature by an act subsequent to the one under which plaintiff claimed his fees, had construed the former act as authorizing the amount claimed. The Court said:

“It is only the intent of the Legislature which enacts a statute that is to govern Courts in the construction thereof. The opinion of a subsequent Legislature upon the meaning of a statute, is entitled to no more weight than that of the same men in a private capacity.”

In the following case the Court said:

“The doctrine of legislative construction is a delicate one. It is an argument frequently of great force \* \* \* and often a controlling principle in the construction of statutes, not because the Legislature has any power, even in terms, to declare the interpretation of a previous statute, but because if the Courts have called attention to a defect or an omission, and it be supplied by the Legislature, there is a fact in the history of legislation from which the Courts may reasonably infer the intent of the law-making power.”

*Fidelity Trust Co. v. Gill Car Co.*, 25 Fed.  
737.

It is true that a statute may be construed in the form of another statute subsequently passed, although this is really in essence new legislation and cannot affect past transactions.

*Stebbins v. Pueblo County*, 4 Fed. 282.

If then an affirmative legislative attempt in express terms to construe the act of a former Legislature, can be construed to be at most but a present enactment governing the future, it would seem that mere failure to do anything can hardly be considered as having much significance except that successive Legislatures have taken no interest in the matter, which is not particularly strange, as it is a fact of which Courts may almost take judicial notice that the important things in which Legislatures fail to take any interest are practically beyond computation.

Even assuming, however, that the failure of the Legislature to act, when action is possible, is an acquiescence in the judicial construction, and that such acquiescence is controlling in a subsequent case upon a Court higher than the one that gave the construction originally, let us stop for a moment and see what action on the part of the Legislature has been possible.

If the Legislature had acted, it must have done one of two things: either have declared that it was the intent of the Legislature creating counties, that they should not be liable for the tortious invasion of a private right, or on the other hand have amended the county law by enacting that thereafter no individual thus damaged should have a right of action therefor against a county.

Now, the first of the above-mentioned courses was not open to the Legislature, not only for the reason heretofore given, that it is not competent for

one Legislature to declare what some preceding Legislature meant, but for the still more powerful reason that it would be putting upon the act a construction contrary to that of the Court, which had already held in effect that the Legislature intended that counties should be liable, and whatever may be the powers of legislative construction, they do not extend that far, for “after all”, to quote from the same volume and page of Cyc., to which the defendant in error has referred this Court:

“It must be remembered that the Courts are the final arbiters as to the practical construction of statutes, and in discharging this important function they are at liberty to disregard legislative construction which in their judgment is not a correct exposition of the original act.”

If, on the other hand, we suppose the Legislature to have specifically granted future immunity for invasion of private rights, we have it taking away from the individual his constitutional rights of redress against an organization or body, which the Courts have already declared to be in its nature no more exempt than an individual or a private corporation.

It is true that legislation exempting municipalities to a limited degree, from the negligence of their officers or employees, has been held constitutional, but not to the extent of granting immunity for a direct injury or invasion of a private right. As for example, in *Vincent v. Brooklyn*, 31 Hun 122, where it was held that a statute providing that

an action for negligence of the city council, or its employees, should only be maintained against the persons causing the injury, could not be construed as exempting the city from liability for death from an explosion of illuminating gas, caused by the negligence of the keeper of the municipal building.

Other cases which are sometimes cited as to the effect of acts exempting municipalities from liability are the following:

For example, it was held in *O'Hara v. City of Portland*, 3 Oregon 325, that an act exempting the city from liability for defects in streets, was not unconstitutional, as violating the provision that no law impairing the obligation of contracts shall be ever passed. The Court said quite pertinently:

“How this amendment of the charter violates this provision of the Constitution, we are unable to see.”

Such a contention, of course, would have no application to the present case.

In *Duncan v. Lynchburg* (Va.) 34 S. E. 964, it was held that a city empowered to co-operate with a county in roadwork, could properly be exempted from liability, as counties are in Virginia, the work being governmental in its nature. It is, of course, quite a different proposition from a contention that the Legislature could constitutionally exempt from liability a body such as the Court in the *Matsumura* case held that the County of Hawaii was.



On the whole, then, it would seem doubtful whether the Legislature, if it created what the Court in the Matsumura case said it had created, could have avoided the effect of that decision except by starting in all over and creating something entirely different, and this it could hardly be expected to do, at least until the present counties had tested their liability and been ruled against in the highest Court to which they have access, which is at the present time the Circuit Court of Appeals.

---

#### NATURE OF COUNTIES IN HAWAII.

It was provided by Section 56 of the Organic Act, that "the Legislature may create counties, and town and city municipalities". It is to be presumed that Congress had in mind counties as they exist in the United States, with their powers and limitations of liability as instruments of government; also, that the Legislature in creating counties intended to create what the Congress authorized them to create. We may also note that Section 56, by the use of the terms "counties", and "town and city municipalities" evidently intended a distinction.

In *Castle v. Secretary of the Territory*, 16 Hawaii, 769, where it was contended that the County Act was invalid as being in conflict with the Organic Act, and as delegating to county officers powers reserved by that act to territorial officers, it was said by the Court (p. 780):

“Further considering the objections presented to the county act, it is to be observed that a county is an agent or instrumentality of the State or Territory, and has only such powers as are granted by the statute creating it.”

For a judicial expression of the Supreme Court of the Territory subsequent to the Organic Act, and prior to the act creating counties, the Court's attention is called to pages 19 and 20 of our original brief, and to the citation therein made from the case of *Coffield v. Territory*, 13 Haw. 478.

The Court is further referred to the expressions used by the Supreme Court of the Territory, in characterizing the counties which had been created by the Legislature as quasi municipal corporations and as agencies or instrumentalities of the general government.

*Kanealii v. Hardy*, 17 Haw. 9 (10 and 14);  
*Territory of Hawaii ex rel County of Oahu v. Whitney*, 17 Haw. 174 (175, 176, 177, 180 and 181).

Further examining the nature of counties in Hawaii as disclosed by the provisions of the County Act itself and by the previous nature of the Government of Hawaii, we find that the power of the counties over roads, bridges, water, lights, fire, sewers and police, are simply the powers exercised formerly by the central government, first under the monarchy, afterwards under the provisional government, later by the Republic of Hawaii and finally by the Territory of Hawaii, up to the time when

counties were created. The government has always been extremely centralized even to minute details, and counties were created particularly to enable the government to throw off upon these local instrumentalities a portion of its responsibilities.

Supervision was retained in the central government, even over many of the matters which were entrusted in a general way to the counties. For example, the Superintendent of Public Works had much authority with respect to roads (See Paragraph 3, Section 9 of the County Act and also Revised Laws 1905, Section 594) which charges him with the execution of all duties relative thereto. It is true that by an amendment in 1907, his powers of supervision were somewhat lessened, but this in no way affects the principle involved in the creation of the counties.

The County Auditor is required to keep his books in accordance with the instructions of the Auditor of the Territory. The County Attorney is made by the County Act a deputy of the Attorney-General of the Territory. The members of the Boards of Supervisors, although elected by the citizens of the county, and although charges may be filed against them by citizens, may only be removed by the Supreme Court of the Territory, and vacancies thus made may only be filled by the Governor of the Territory (Sec. 60 of the County Act).

The counties have no powers of taxation and no taxation officers. The County Act originally provided for tax assessors and collectors (Secs.

87 and 88) but these provisions were repealed by a later act at the same session of the Legislature (Act 54, 1905).

See also *County of Kauai v. Holt*, 17 Haw. 146 (148).

The taxes of the Territory of Hawaii are road, poll, school, property and income. Not a dollar of any of this is collected by or paid to any county. They are all paid into the territorial treasury. The road taxes, by a provision of general law, are spent in the districts from which they come. These districts are geographical divisions independent of the County Act and long antedating it. The property and income taxes are distributed according to plans which are changed from time to time, but which are under the supervision and control of territorial and county officers.

In matters of police, the counties took over work hitherto handled by the Territory. The supervision of police matters throughout the Territory had been previously handled to the minutest detail by the territorial government. There were no local police in the proper sense of the word. Section 67 of the County Act provides that the sheriff of each county shall exercise such powers and perform all the duties hitherto exercised and performed by the high sheriff of the Territory.

If counties are anywhere government agencies and instrumentalities, they are so in the Territory of Hawaii. As to this matter, the Court's atten-



tion is further called to the dissenting opinion of Mr. Justice Wilder in the Matsumura case.

For the reasons herein set forth, in addition to those maintained in our original brief, and in the oral argument presented to this Court, it is again maintained that the judgment heretofore rendered on behalf of the defendant in error should be reversed.

Respectfully submitted,

W. H. SMITH,

*Attorney for Plaintiff in Error.*



8

No. 2748

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

---

COUNTY OF HAWAII,

*Plaintiff in Error,*

VS.

HALAWA PLANTATION, LIMITED

(a corporation),

*Defendant in Error.*

---

REPLY OF DEFENDANT IN ERROR TO SUPPLEMENTAL  
BRIEF FOR PLAINTIFF IN ERROR.

---

*P. D. Monckton,*  
S. H. DERBY,

*Of Counsel for Defendant in Error.*

---

*Filed this.....day of June, 1916.*

*FRANK D. MONCKTON, Clerk.*

*By.....Deputy Clerk.*





No. 2748

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

COUNTY OF HAWAII,

*Plaintiff in Error,*

VS.

HALAWA PLANTATION, LIMITED

(a corporation),

*Defendant in Error.*

---

## REPLY OF DEFENDANT IN ERROR TO SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

---

The supplemental brief of the plaintiff in error in this case deals mainly with three propositions, namely: (a) the weight to be accorded to the decision in *Matsumura v. County of Hawaii*, 19 Haw. 18; (b) the effect or non-effect of the failure of the territorial legislature to amend the County Act to meet said decision, and (c) the nature of counties in Hawaii. The scope of the supplemental brief is somewhat larger than the request for leave to submit it indicated, and the fact should be borne in mind that it has to be answered by local counsel in San Francisco who have not the advantages that attorneys on the spot would have. However, we shall pass all of this over

and endeavor to briefly meet the points made to the best of our ability.

---

## I.

### THE EFFECT OF THE MATSUMURA DECISION ON THE PRESENT CASE.

Counsel for the County of Hawaii in his supplemental brief contends that the rule laid down in the cases on pages 20 and 21 of our main brief does not apply to cases of appeals from territorial courts. This may be true if it means that a federal court is not absolutely bound by a decision of a territorial court construing territorial laws in the same way as it is bound by a decision of a state court construing state laws. Nevertheless the difference is simply one of degree, and very great weight is given to the decisions even of ordinary territorial courts, where local laws are in question.

This is well illustrated by the case of *Copper Queen Consolidated Mining Co. v. Territorial Board of Equalization of the Territory of Arizona*, 206 U. S. 474; 51 L. Ed. 1143. In that case the legislature of Arizona enacted a law which had been previously enacted by the State of Colorado. When the Act came under consideration in the court, however, the Supreme Court of the Territory of Arizona refused to construe the Act as it had been previously construed by the Supreme Court of the State of Colorado in spite of the well known principle that, where a law of one jurisdiction is enacted in another jurisdiction, the construction given said Act in the

former jurisdiction will usually be followed. The Supreme Court of the United States affirmed the judgment of the Arizona court upon the ground that it was a construction of a local statute to which the United States Supreme Court would naturally lean, whether its own opinion was otherwise or not.

We contend that the rule applicable to territorial courts in general should be even more strictly adhered to in the case of appeals from the Supreme Court of the Territory of Hawaii. It must be remembered in this connection that Hawaii has a civilization older than that of many of the states of the Union. The first volume of Hawaiian Reports was published in 1857 and covered decisions for a period of ten years prior to that time. By the time the Islands were annexed to the United States a complete system of jurisprudence had grown up, which placed Hawaii in a very different position from newly organized territories of the United States. Congress recognized this distinction in passing the Organic Act for the government of the Territory of Hawaii, and it nowhere more fully recognized it than in Section 86 of said act, which provided in part as follows:

“The laws of the United States relating to appeals, writs of error, removal of causes and other matters and proceedings as between the courts of the United States and the courts of the several states shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii.”

This law was changed in only one respect by the amendment of the Organic Act in 1905, and that was by providing that writs of error and appeals might

be taken to the United States Supreme Court where the amount involved exceeded the sum of five thousand dollars. This provision was very recently changed so as to confer appellate jurisdiction on this court instead of the Supreme Court of the United States. It is readily apparent, therefore, that considerable distinction should be made between the decisions of the Supreme Court of the Territory of Hawaii and the decisions of ordinary territorial courts. It is also readily apparent that the present case is before this court *not because any provision of the County Act, a purely local law, is involved*, but simply because the injury to plaintiff's cane field amounted to more than five thousand dollars.

There is a question of contributory negligence in the case and on this question, as well as other questions of a similar character, we quite recognize that this court should exercise its own judgment entirely and that it is in no way bound by the decision of the Supreme Court of Hawaii in so doing. We earnestly contend, however, that, on the question of the construction which is to be given to the laws passed by the local legislature of the Territory of Hawaii, the decision of the Supreme Court of that territory, if not controlling, is at least one to which the very greatest weight should be given.

Counsel for the County of Hawaii refers in his brief to several decisions of the United States Supreme Court which were referred to by us in oral argument, and also to other decisions. It seems to us that these decisions make strongly for the contention which we are now advancing. The first of these de-



cisions is the case of *Keahola v. Castle*, 210 U. S. 149; 52 L. Ed. 998. In that case the Hawaiian Supreme Court held, following an earlier decision, that a law legitimating children borne out of wedlock upon the marriage of their parents was not applicable to the issue of an adulterous relation. As will be observed from a reading of the cases, the previous Hawaiian decision on this point was in conflict with the decisions of practically all the states of the Union. Nevertheless the United States Supreme Court held that it was a matter of local law, and that the decision of the court on the spot should be followed.

The next case referred to by counsel is the case of *Cotton v. Hawaii*, 211 U. S. 162; 53 L. Ed. 131. This case involved the question of what constituted a final judgment in the Territory of Hawaii and the United States Supreme Court, in following a Hawaiian decision which was promulgated a considerable time after a right of appeal to the Supreme Court of the United States had been given, said *inter alia*:

“The statutes, it will be observed, confer no express power upon the Supreme Court of the Territory to enter a final judgment in a cause upon the overruling of exceptions, and, indeed, that the Supreme Court of the Territory does not construe the territorial statutes as giving it such authority, and, therefore, that the court could not have intended to exert such power in this case, so conclusively appears from recent decisions of the Supreme Court of Hawaii as to leave the question *not open to controversy*.”

Later, in the same opinion, the Supreme Court of the United States expressly points out that it is apply-

ing the construction given by the Supreme Court of Hawaii to the local statutes of that territory.

We will refer next to the two Atcherly cases. In the first of these, *Lewers & Cooke v. Atcherly*, 222 U. S. 285; 56 L. Ed. 202, the court held that it would follow the decision of the Hawaiian Supreme Court to the effect that a judgment of the Land Commission of Hawaii could not be attacked except by a direct appeal to the Supreme Court of the territory, as provided by law. In its opinion in this case the Supreme Court of the United States points out very forcibly the great weight which should be given to the opinion of the court upon the spot in construing local laws, and also points out the special reasons for following this course in the case of the courts of Hawaii.

The same question which was involved in the above case came again before the Supreme Court of Hawaii in the case of *Kapiolani Estate v. Atcherly*, 21 Haw. 441. In that case the Supreme Court of the territory came to the conclusion that its previous decision in the case of *Lewers & Cooke v. Atcherly*, which had been affirmed by the United States Supreme Court, was erroneous, and that, as a matter of fact, the plaintiff was entitled to go behind the judgment of the Land Commission referred to in that case. The Supreme Court of Hawaii stated that it would reverse its previous decision, therefore, except for the fact that it was bound by the affirmance of that decision by the Supreme Court of the United States, using in part the following language:

“It makes no difference that in making that decision the Supreme Court followed the opinion of this court upon a matter of *local law*, and that we now believe that that opinion was not well founded. If the former ruling is to be reversed, the reversal is to be made by that court, and not this. The most that we can do now is to respectfully point out wherein, in our judgment, the former opinion was wrong. This we have done, believing it was our duty to do it, and with this our duty in the premises ends.”

This case was also taken to the United States Supreme Court, which held that, as the Hawaiian Supreme Court now took a different view of the effect of the Land Commission award in question, it would follow such new view, even though contrary to its previous decision, and, therefore, it reversed the decision of the Hawaiian Supreme Court and ordered that judgment be entered in the way said court had held the same should have been entered, if it had not been bound by the earlier decision of the Supreme Court of the United States.

238 U.S. 119

The final case to which attention is called is the case of *John Ii Estate v. Brown*, 235 U. S. 342; 59 L. Ed. 259. In that case, as stated by counsel for plaintiff in error, the construction given by the Supreme Court of the Territory of Hawaii to a will written in the Hawaiian language was sustained as against the construction given by the federal court of the territory and affirmed by this court, and yet, from an examination of the will in question, it is very apparent that the construction given it by the Hawaiian Supreme Court was clearly wrong, and the construc-

tion by the federal courts in question was as clearly right.

In view of the above decisions we submit that this court should follow the decision in the Matsumura case, especially when it is further considered that said decision was re-affirmed in 19 Haw. 496, and again in the case at bar. As pointed out by counsel for the plaintiff in error himself, the County Act of the Territory of Hawaii is very different in a great many respects from the County Acts of the various states. Hence, the construction given to that different Act by the highest court of the territory in which the same was passed should, in our opinion, be accorded controlling weight. And when it is further considered that the rule that ordinary counties are not liable for torts is a rule based on a misapprehension of the early case of *Russell v. Men of Devon*, and has been recognized by most of the text writers as wholly erroneous in principle, the reasons for following the decision of the local court become even stronger.

It is submitted that to reverse the decisions of the local courts on matters of local law in a case which has come to this court, not because such local law is involved but simply because there is over five thousand dollars in controversy, would be to create an extremely bad precedent. We submit, therefore, that the Matsumura decision should be accorded controlling weight on this appeal.



## II.

THE EFFECT OF THE FAILURE OF THE LEGISLATURE OF  
THE TERRITORY OF HAWAII TO AMEND THE COUNTY ACT  
TO MEET THE MATSUMURA DECISION, ALTHOUGH AMEND-  
ING IT IN NUMEROUS OTHER RESPECTS.

As pointed out in the addendum to our main brief, the legislature of the Territory of Hawaii has met in four regular sessions since the Matsumura decision was handed down, and has failed to amend the County Act to meet said decision. As also pointed out in said addendum, the legislature has amended said Act in numerous other respects, including the very section under which the Matsumura case and this case were brought. The presumption is very strong, therefore, that the legislature has acquiesced in the construction given the law in that decision and, indeed, the Supreme Court of Hawaii so holds in the case at bar (Record, p. 304).

None of the cases referred to in the supplemental brief make in any way against the above principle, but they in fact all support it either affirmatively or by inference. Hence, further discussion of the authorities seems useless. Counsel, however, refers to some of the cases as involving "some affirmative act" of the legislature and a "re-enactment" of the statutes involved and seeks to distinguish them on this ground. These considerations, however, are not absent but present in the case at bar. In the first place the territorial legislature has repeatedly amended the County Act and yet has not sought to meet the Matsumura decision. In the second place the County Act has been practically *re-enacted*, as will now be pointed out.

By Act 11 of the Hawaiian Session Laws of 1913 a commission was appointed to compile the various laws of Hawaii, said Act, as will be seen from a casual examination of the same, giving the Commissioners extremely wide powers (see Revised Laws of Hawaii, 1915, p. 5). The compilation was duly prepared, and in the preface thereof (*id.* p. 3) the following significant statement appears:

“The general plan of the work follows that adopted by the compilers of the Revised Laws of 1905, which work marked a long step in advance in the matter of *the enactment of statutory law* in this jurisdiction, and has given general satisfaction to the courts and the bar of this territory. The last revision, therefore, forms the basis of this, obsolete and repealed matter being omitted and new matter contained in the Session Laws of 1905 to 1913 being incorporated. The most important of the new legislative enactments, *the county act of 1905, and the municipal act of 1907, as amended and supplemented by later legislation*, have been included, with certain chapters and sections contained in the Revised Laws of 1905 which the commission believed to have been amended by implication by the legislation mentioned under three titles, designated respectively ‘County Government’, ‘Municipal Government’, and ‘Provisions Common to Counties and City and County’.”

Furthermore, under Section 1503 of the compilation (p. 630), dealing with the powers and liabilities of counties, we find the following significant note:

“County is liable for injury to private property caused by negligent act of a road employee: 19 H. 18; 19 H. 496.”

The Revised Laws of Hawaii, 1915, with the foregoing construction placed on them, were duly enacted into law by the following session of the legislature.

Hawaiian Session Laws of 1915, Act 7, p. 6.

Finally to clinch matters, the local court in the case at bar has held that the effect of the action of the local legislature has been to sanction the Matsumura decision (Record, p. 304). It would be hard to imagine a case more compelling as regards legislative and judicial sanction of a decision.

Counsel for the county claims, however, that the legislature could have done nothing to meet the situation. He claims that it could not have provided that the County Act should not be construed so as to make counties liable for torts because this would be usurping judicial functions, and he then claims that an Act directly relieving counties from liability for torts would have been unconstitutional. To state such an argument is, in our opinion, to refute it and no cases are cited which lead to any such conclusion. If a legislature may pass a law it may certainly provide, if it does so directly, how its provisions shall be construed, and such construction will undoubtedly be binding on the courts as to cases arising thereafter (see *36 Cyc.*, 1105-1106). And if, as counsel claims, the weight of authority is that counties are not liable for torts, a legislative Act declaring them not so liable could hardly be held unconstitutional. Counties created solely by legislative action can surely be given such immunities as the will of their creator endows them with.

We submit that the contentions in question call for no further discussion.

---

### III.

#### THE NATURE OF COUNTIES IN HAWAII.

Counsel for the county in his supplemental brief makes a searching and careful analysis of the County Act, with which we shall not attempt to take issue. To us, however, the points made, if well founded, tend to show great limitations on the powers usual to counties, and tend to liken such counties to mere municipalities. In fact such was the very argument advanced by Mr. Justice Ballou in the Matsumura case (19 Haw. at pp. 33-34). The peculiar nature of county organization in Hawaii is not, as counsel seems to think, a reason for applying the rule applicable to *ordinary* counties, but forms a cogent and controlling reason for deferring to the judgment of the court "on the spot" (Atcherly cases, *supra*), which alone is familiar with that peculiar organization.

Nor are the Hawaiian decisions cited on this point of any significance. The question arising in the Matsumura case did not arise in those cases and was not there decided. Nor is anything in those cases in conflict with the Matsumura decision (see especially concurring opinion of Judge Hartwell in *Territory v. Whitney*, 17 Haw. at pp. 188-190). And finally, if there were such conflict, the earlier decisions would be clearly overruled by the later one.



All of which, it is submitted, leads to the inevitable conclusion that the judgment should be affirmed.

Dated, San Francisco,

June 1, 1916.

Respectfully submitted,

S. H. DERBY,

*Of Counsel for Defendant in Error.*



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

J. C. KENNEDY and A. J. KENNEDY,  
Petitioners,  
vs.  
S. T. HILLS, as Trustee,  
Respondent.

In the Matter of J. C. KENNEDY and A. J. KENNEDY, Doing Business Under the Firm Name of J. C. KENNEDY & SON, Bankrupts.

---

**Petition for Revision**

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, of a Certain Order of the United States District Court for the Eastern District of Washington, Southern Division.

---

Filed

APR - 8 1916





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

J. C. KENNEDY and A. J. KENNEDY,  
Petitioners,  
vs.  
S. T. HILLS, as Trustee,  
Respondent.

In the Matter of J. C. KENNEDY and A. J. KENNEDY, Doing Business Under the Firm Name of J. C. KENNEDY & SON, Bankrupts.

---

**Petition for Revision**

**Under Section 24b of the Bankruptcy Act of Congress,  
Approved July 1, 1898, to Revise, in Matter of Law,  
of a Certain Order of the United States Dis-  
trict Court for the Eastern District of  
Washington, Southern Division.**

---



# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Attorneys of Record, Names and Addresses of..	9
Certificate of Clerk U. S. District Court to Transcript of Record.....	16
Certificate of Referee in Bankruptcy.....	9
Names and Addresses of Attorneys of Record..	9
Opinion .....	11
Order Affirming Referee as to Exemptions.....	4
Order Affirming Referee as to Exemptions.....	13
Petition to Review in Bankruptcy.....	1
Stipulation Re Transcript of Record on Petition for Revision .....	15





*United States Circuit Court of Appeals for the Ninth Circuit.*

In the Matter of J. C. KENNEDY and A. J. KENNEDY, Doing Business Under the Firm Name of J. C. KENNEDY & SON; the Marital Community Composed of J. C. KENNEDY and ELLEN KENNEDY, His Wife; and the Marital Community Composed of A. J. KENNEDY and ETTA F. KENNEDY, his wife,  
Bankrupts.

**Petition to Review in Bankruptcy.**

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Your petitioners, J. C. Kennedy and A. J. Kennedy, are citizens of the United States and reside in the City of Spokane, State of Washington, and were on the 8th day of February, 1915, duly adjudged bankrupt by the District Court of the United States for the Eastern District of Washington, Southern Division, and thereafter S. T. Hills was duly appointed trustee in bankruptcy and duly qualified and is still acting as such trustee.

That your petitioners and each of them are and were at the time the petition in bankruptcy was filed loggers engaged in the business of logging for the support of themselves and their families, and at the time said petition was filed they were the owners of as individuals, to J. C. Kennedy one team of mares, to A. J. Kennedy one team of geldings.

That in their schedules filed in said matter your

petitioners claimed said property as exempt under Subdivision 13, Section 563, Remington & Ballinger's Annotated Codes and Statutes of Washington; that thereafter the trustee refused to allow said horses as exempt and your petitioners duly filed objections to said trustee's report, a hearing was had thereon, and the referee in bankruptcy confirmed the report of said trustee. Thereafter a certificate of review was duly granted to the said District Court for the Eastern District of Washington by the said referee and that on or about the 8th day of February, 1916, an order was duly entered by the said district judge affirming and approving the order of said referee. A copy of said order of the district judge is hereto annexed.

That said order was and is erroneous as a matter of law in that:

(1) Your petitioners were entitled to have said horses set off to them as exempt.

(2) That Subdivision 13 of Section 563, Remington & Ballinger's Annotated Codes and Statutes of Washington allow your petitioners said horses as exempt.

WHEREFORE, Your petitioners, feeling aggrieved because of said order, ask that the same may be revised in matter of law by this Honorable Court as provided in section 24-b of the Bankruptcy Act and rules of practice in such case provide, and that the same may be reversed, and for such other and further relief as may be just and proper.

Dated at Spokane, Washington, February 21st,  
1916.

J. C. KENNEDY,  
A. J. KENNEDY,  
Petitioners.

FABIAN B. DODDS,  
901 Old Nat'l Bk. Bldg., Spokane, Wash.,  
Atty. for Petitioners.

State of Washington,  
County of Spokane,—ss.

J. C. Kennedy, the petitioner mentioned in the foregoing petition, does hereby make solemn oath that the statements of fact contained in said petition are true according to the best of his knowledge, information and belief.

J. C. KENNEDY.

Subscribed and sworn to before me this 21 day of February, 1916.

[Seal] C. W. OLSON,  
Notary Public Residing at Spokane, Washington.

State of Washington,  
County of Spokane,—ss.

A. J. Kennedy, the petitioner mentioned in the foregoing petition, does hereby make solemn oath that the statements of fact contained in said petition are true according to the best of his knowledge, information and belief.

A. J. KENNEDY.

Subscribed and sworn to before me this 21 day of February, 1916.

[Seal] G. F. BOESCH,  
Notary Public Residing at Spokane, Washington.

*In the District Court of the United States, Eastern  
District of Washington, Southern Division.*

No. 2106.

In the Matter of J. C. KENNEDY and A. J. KENNEDY, Doing Business Under the Firm Name of J. C. KENNEDY & SON et al.,  
Bankrupts.

**Order Affirming Referee as to Exemptions.**

This cause came on to be heard upon the petition of the bankrupts, J. C. Kennedy and A. J. Kennedy to review the order of the referee denying as exempt, under Subdivision 13 of Section 563 of Remington & Ballinger's Annotated Codes and Statutes of Washington, two teams of horses, respectively claimed by said bankrupts as exempt under said section.

The undisputed facts are that J. C. Kennedy and A. J. Kennedy were, prior to the filing of the petition for adjudication herein, copartners engaged in the business of logging for the support of themselves and families; that each partner was the owner of a team of horses as his individual property.

The matter having been submitted upon briefs of counsel for the bankrupts and for the trustee and the Court being duly advised in the premises and having heretofore filed its opinion herein.

IT IS ORDERED that the order of the referee refusing to set aside, to each of said bankrupts above named, his team as exempt under said Subdivision 13 of Remington & Ballinger 563, be and the same hereby is affirmed.



The exception of each of said bankrupts to this order is allowed.

Dated this —— day of January, 1916.

(Signed) FRANK H. RUDKIN,  
Judge.

Service of the within petition accepted and further notice of the filing of said petition waived.

Dated, Seattle, Washington, February 28th, 1916.

TREFETHEN, GRINSTEAD & LAUBE,  
Attorneys for Trustee.

---

[Endorsed]: No. 2762. United States Circuit Court of Appeals for the Ninth Circuit. J. C. Kennedy and A. J. Kennedy, Petitioners, vs. S. T. Hills, as Trustee, Respondent. In the Matter of J. C. Kennedy and A. J. Kennedy, Doing Business Under the Firm Name of J. C. Kennedy & Son, Bankrupts. Petition for Revision. Under Section 24b of the Bankruptcy Act of Congress Approved July 1, 1898, to Revise, in Matter of Law, of a Certain Order of the United States District Court for the Eastern District of Washington, Southern Division.

Filed March 16, 1916.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.



**United States**  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

---

J. C. KENNEDY and A. J. KENNEDY,  
Petitioners,

vs.

S. T. HILLS, as Trustee,  
Respondent.

In the Matter of J. C. KENNEDY and A. J. KENNEDY, Doing Business Under the Firm Name of J. C. KENNEDY & SON, Bankrupts.

---

**TRANSCRIPT OF RECORD IN SUPPORT OF  
PETITION FOR REVISION**

**Under Section 24b of the Bankruptcy Act of Congress,  
Approved July 1, 1898, to Revise, in Matter of Law,  
of a Certain Order of the United States Dis-  
trict Court for the Eastern District of  
Washington, Southern Division.**

---





**Names and Addresses of Attorneys of Record.**

FABIAN B. DODDS, 901 Old National Bank Building,  
Spokane, Washington,

Attorney for Petitioners.

TREFETHEN, GRINSTEAD & LAUBE, Coleman  
Building, Seattle, Washington,

Attorneys for Respondent. [2\*]

---

**[Certificate of Referee in Bankruptcy.]**

*In the District Court of the United States, Eastern  
District of Washington, Southern Division.*

IN BANKRUPTCY—No. 427.

In the Matter of J. C. KENNEDY and A. J. KENNEDY,  
Doing Business Under the Firm Name  
of J. C. KENNEDY & SON et al.

To the Honorable FRANK H. RUDKIN, District  
Judge:

I, A. C. Wilkinson, the Referee in Bankruptcy in charge of this proceeding, do hereby certify that in the course of such proceeding an order, a copy of which is annexed to the petition hereinafter referred to, was made and entered on the 16th day of December, 1915. That on the 22d day of December, 1915, J. C. Kennedy and A. J. Kennedy, two of the bankrupts in such proceeding, feeling aggrieved thereat, filed a petition for review, which was granted.

That a summary of the evidence on which such order was based, is as follows:

---

\*Page-number appearing at foot of page of original certified Transcript of Record in Support of Petition for Revision.

That at the time of the purchase of the two heavy horses and harness referred to in said order by J. C. Kennedy and A. J. Kennedy, respectively, said bankrupts and each of them, were solvent; that the said property was purchased with the individual money of the respective bankrupts above named and said horses and property were not put into the partnership business as partnership property of J. C. Kennedy & Son; that both of the bankrupts, J. C. Kennedy and A. J. Kennedy, were loggers, were engaged in the business of logging and had a family living with and dependent upon them and each of them; that the value of the geldings belonging to A. J. Kennedy is \$300; that the value of the mares belonging to J. C. Kennedy is \$350; that neither of the bankrupts were draymen, teamsters or farmers; that they have no exemptions and have claimed none as loggers except the horses herein mentioned.

That the question presented on this review is whether or not said J. C. Kennedy and A. J. Kennedy are entitled to said horses and harness as exempt property under Subdivision 13, Section 563, Remington & Ballinger's Annotated Codes and Statutes of Washington. [3]

I hand up herewith for the information of the Judge the following papers:

(1) The petition on which this certificate is granted.

(2) The original order complained of, dated December 16th, 1915.

Respectfully submitted,

(Signed) A. C. WILKINSON,

Referee in Bankruptcy.

[Endorsed]: No. 427. Referee's Certificate of Review. Filed at 10 A. M. Dec. 23, 1915. A. C. Wilkinson, Referee in Bankruptcy.

Filed in the U. S. District Court, Eastern Dist. of Washington. Dec. 23, 1915. W. H. Hare, Clerk. By Edwd. E. Cleaver, Deputy. [4]

---

*In the District Court of the United States for the Eastern District of Washington, Southern Division.*

No. 427.

In the Matter of J. C. KENNEDY and A. J. KENNEDY, Doing Business Under the Firm Name of J. C. KENNEDY & SON,

Bankrupts.

**Opinion.**

FABIAN B. DODDS, for Bankrupts.

TREFETHEN, GRINSTEAD & LAUBE, for Trustee.

RUDKIN, District Judge.

The bankrupts, J. C. Kennedy and A. J. Kennedy, are copartners engaged in the business of logging for the support of themselves and families, and each partner is the owner of a team of hōrse as his individual property used in that business. This is a

petition to review an order of the referee refusing to set aside his team to each of the bankrupts under the exemption laws of the State. The exemption is claimed under Subdivision 13 of Section 563, Rem. & Bal. Code, which exempts "to a person engaged in the business of logging for his support or that of his family, three yoke of work cattle and their yokes, and axes, chains, implements for the business, and camp equipments, not exceeding three hundred dollars, coin, in value." The extreme liberality with which exemption laws are usually construed will be readily conceded; but courts cannot legislate under the guise of liberal construction. My attention has been directed to authorities holding that the term "horses" includes mules and jackasses; that the term "cattle" includes horses; that the term "team with vehicle" includes a bicycle; that the term "carriage or buggy" includes an automobile; and if Subdivision 13 stood alone there would be force in the contention that the word cattle included horses. But when Section 563 is considered in its entirety it seems manifest that no such construction is permissible. [5]

Thus Subdivision 5 exempts to a farmer one span of horses or mules with harness; or two yoke of oxen with yokes and chains; Subdivision 7 exempts to a physician one horse with harness and buggy, together with other property; and Subdivision 12 exempts to a teamster or drayman his team consisting of one span of horses, or mules, or two yoke of oxen, or a horse and mule, with harness, yokes, and so



forth. It will thus be seen that in the section in question the legislature had in mind horses, mules, harness, oxen, work cattle, yokes, and chains. In the light of this it is idle to claim that the legislature did not use the term "three yoke of work cattle with their yokes" advisedly in Subdivision 13. The fact that oxen or work cattle may have been used extensively in the logging business when Section 563 was enacted, and that they are not so used to-day, cannot change the meaning of the statute because it has the same meaning to-day that it had at the time of its first enactment more than half a century ago. For this reason I am clearly of opinion that a team of horses is not exempt to a person engaged in the logging business and the order of the referee is affirmed.

[Endorsed]: No. 427. Opinion. Filed in the U. S. District Court, Eastern Dist. of Washington. Jan. 10, 1916. W. H. Hare, Clerk. By Edwd. E. Cleaver, Deputy. [6]

---

*In the District Court of the United States, Eastern District of Washington, Southern Division.*

No. 427.

In the Matter of J. C. KENNEDY and A. J. KENNEDY, Doing Business Under the Firm Name of J. C. KENNEDY & SON et al.

**Order Affirming Referee as to Exemptions.**

This cause came on to be heard upon the petition of the bankrupts J. C. Kennedy and A. J. Kennedy to review the order of the referee denying as ex-

empt, under Subdivision 13 of Section 563 of Remington & Ballinger's Annotated Codes and Statutes of Washington, two teams of horses, respectively claimed by said bankrupts as exempt under said section.

The undisputed facts are that J. C. Kennedy and A. J. Kennedy were, prior to the filing of the petition for adjudication herein, copartners engaged in the business of logging for the support of themselves and families; that each partner was the owner of a team of horses as his individual property.

The matter having been submitted on briefs of counsel for the bankrupts and for the trustee, and the Court being duly advised in the premises and having heretofore filed its opinion herein,

IT IS ORDERED that the order of the referee refusing to set aside, to each of said bankrupts above named his team as exempt under said Subdivision 13 of Remington & Ballinger's 563, be and the same hereby is affirmed.

The exception of each of said bankrupts to this order is allowed.

Dated this 19th day of January, 1916.

(Signed) FRANK H. RUDKIN,

Judge.

[Endorsed]: No. 427. Filed in the U. S. District Court, Eastern Dist. of Washington. Jan. 20, 1916. W. H. Hare, Clerk. By Edwd. E. Cleaver, Deputy.  
[7] ..

*In the District Court of the United States for the  
Eastern District of Washington, Southern Division.*

No. 427.—IN BANKRUPTCY.

In the Matter of J. C. KENNEDY and A. J. KENNEDY, Doing Business Under the Firm Name of J. C. KENNEDY & SON, et al.,  
Bankrupts.

**Stipulation [Re Transcript of Record on Petition for  
Revision].**

WHEREAS, the bankrupts, J. C. Kennedy and A. J. Kennedy, are each claiming a team of horses as exempt, and whereas said bankrupts are about to file a petition to revise in the Circuit Court of Appeals for the Ninth Circuit, to revise an order of the Honorable Frank H. Rudkin, District Judge, affirming an order of the referee in bankruptcy refusing to allow said horses as exempt, said order being entered on the 8th day of February, 1916, now, therefore,

IT IS STIPULATED, by and between Fabian B. Dodds as attorney for said bankrupts and the petitioners in said petition to revise, and Trefethen, Grinstead and Laube, attorneys for the trustee and respondents to said petition, that the record on review shall consist of the following:

- (1) This stipulation.
- (2) The referee's certificate on review, which contains the facts.

- (3) The order of the District Judge on which the petition to revise is based.
- (4) The opinion of the District Judge.

Dated February 28th, 1916.

TREFETHEN, GRINSTEAD & LAUBE,  
Attorneys for Trustee.  
FABIAN B. DODDS,  
Attorney for Bankrupts.

[Endorsed]: No. 427. Stipulation. Filed in the U. S. District Court, Eastern District of Washington. Mar. 14, 1916. W. H. Hare, Clerk. By Edwd. E. Cleaver, Deputy. [8]

---

**[Certificate of Clerk, U. S. District Court to  
Transcript of Record.]**

*In the District Court of the United States, for the  
Eastern District of Washington, Southern Division.*

United States of America,  
Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages, numbered from one to eight, inclusive, as called for in the annexed stipulation, are true and correct copy of the record, as the same remains on file and of record in said District Court, and the same which I transmit, constitute my return to the annexed stipulation, lodged and filed in my office on the 14th day of March, A. D. 1916.

I also transmit and annex the original Stipulation in said action.



I further certify that the cost of preparing and certifying said record amounts to the sum of \$3.50 and the same has been paid in full by Fabian B. Dodds, solicitor for appellants.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court at the city of Spokane, in said Eastern District of Washington, this 18th day of March, A. D. 1916, and of the Independence of the United States of America, the one hundred and fortieth.

[Seal]

W. H. HARE,

Clerk U. S. District Court, Eastern District of Washington. [9]

---

[Endorsed]: No. 2762. United States Circuit Court of Appeals for the Ninth Circuit. J. C. Kennedy and A. J. Kennedy, Petitioners, vs. S. T. Hills, as Trustee, Respondent. In the Matter of J. C. Kennedy and A. J. Kennedy, Doing Business Under the Firm Name of J. C. Kennedy & Son, Bankrupts. Transcript of Record in Support of Petition for Revision. Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, of a Certain Order of the United States District Court for the Eastern District of Washington, Southern Division.

Filed March 23, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

CALIFORNIA CANNERIES COMPANY, a Corporation,

Appellant,

vs.

DUNKLEY COMPANY, a Corporation,

Appellee.

---

**Transcript of Record.**

---

Upon Appeal from the United States District Court for the  
Northern District of California, Second Division.

---

**Filed**

APR - 4 1916

**F. D. Monckton,**  
**Clerk.**

---





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

CALIFORNIA CANNERIES COMPANY, a Corporation,  
ration,

Appellant,

vs.

DUNKLEY COMPANY, a Corporation,

Appellee.

---

**Transcript of Record.**

---

Upon Appeal from the United States District Court for the  
Northern District of California, Second Division.

---



# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Answer of the California Canneries Co. to Plaintiff's Bill of Complaint.....	8
Assignment of Errors.....	21
Bill of Complaint.....	1
Certificate of Clerk U. S. District Court to Transcript of Record.....	33
Citation on Appeal....	34
Interlocutory Decree.....	12
Order Allowing Appeal.....	27
Order Extending Time to File Record and Docket Case.....	36
Petition for Order Allowing Appeal....	20
Praeipce for Transcript of Record.....	32
Return on Service of Writ.....	7
Stipulation Extending Time to File Record on Appeal and to Docket Case with the Clerk of the Court Above Entitled.....	37
Subpoena Ad Respondendum.....	6
Undertaking on Appeal.....	29





*In the District Court of the United States, in and for  
the Northern District of California, Second  
Division.*

(No. 203.)

DUNKLEY COMPANY,

Plaintiff,

vs.

CALIFORNIA CANNERIES COMPANY,

Defendant.

**Bill of Complaint.**

FOR INFRINGEMENT OF PATENT, NO.

1,104,175.

Now comes Dunkley Company, plaintiff in the above-entitled suit, and files this its bill of complaint against California Canneries Company, defendant, and for cause of action alleges:

1. That the full name of plaintiff is Dunkley Company, and during all the times hereinafter mentioned said plaintiff was and still is a corporation created under the laws of the State of Michigan, and having its principal place of business at the city of Kalamazoo, in the State of Michigan.

2. That the full name of the defendant is California Canneries Company, and during all the times hereinafter mentioned said defendant was and still is a corporation created and existing under the laws of the State of California, having its principal place of business at the city and county of San Francisco in the State of California.

3. That the ground upon which the Court's juris-

diction depends is that this is a suit in equity arising under the patent laws of the United States.

4. That heretofore, to wit, on and prior to November 29, 1904, one Samuel J. Dnnkley was the original and first inventor of a new and useful invention, to wit, a machine for peeling peaches [1\*] and other fruit, and on that day made application to the Government of the United States for the issuance to him of letters patent therefor, and before the issuance of any patent therefor said Dunkley sold and assigned to the plaintiff herein the aforesaid invention and application, together with such letters patent as might be granted thereon.

5. That thereafter, to wit, on July 21, 1914, such proceedings were had and taken in the matter of said application that letters patent of the United States for said invention numbered 1,104,175, were granted, issued and delivered by the Government of the United States to the plaintiff whereby there was granted to the plaintiff, its successors and assigns, the sole and exclusive right to make, use and vend the said invention throughout the United States of America and the territories thereof during the period of seventeen years from July 21st, 1914; that a more particular description of the invention patented in and by said letters patent will fully appear from the said letters patent themselves which are ready in court to be produced by the plaintiff.

6. That ever since the issuance of said letters patent, plaintiff has been and still is the sole owner and holder thereof and of all the rights thereby granted.

---

\*Page-number appearing at foot of page of original certified Record.

7. That since the issuance of said patent plaintiff has practiced the said invention by putting into use machines containing the same, and upon each of said machines has marked the word "Patented," together with the date and number of said letters patent.

8. That since the issuance of said letters patent, in the Northern District of California and elsewhere, the defendant without the license or consent of the plaintiff has made and used and is now engaged in using machines for peeling peaches and other [2] fruit, containing the invention patented in and by said letters patent, No. 1,104,175, and has thereby infringed upon said letters patent: that by reason of the infringement aforesaid, defendant has realized profits, and plaintiff has suffered damages, but the amount of such profits and damages is unknown to plaintiff and can be ascertained only by an accounting.

9. That plaintiff has requested defendant to desist from infringing upon the said letters patent and to account to the plaintiff for the damages suffered by plaintiff and the profits realized by the defendant from past infringement, but the defendant has failed and refused to comply with said request or any part thereof.

10. That the defendant threatens to continue the said infringement and unless restrained therefrom by this court will continue the same, whereby plaintiff will suffer great and irreparable injury and damage, for which it has no plain, speedy or adequate remedy at law.

WHEREFORE, plaintiff prays:

I. That upon the filing of this bill a preliminary injunction be granted to plaintiff enjoining and restraining the defendant, its officers, agents, servants, attorneys and employees, pendente lite, from making, using or selling, or threatening, advertising or offering to make, use or sell any machine for peeling peaches or other fruit containing the invention patented in and by said letters patent, No. 1,104,175, and from further infringing upon said letters patent either directly or indirectly or in any manner whatever.

II. That upon the final hearing, the defendant herein, its officers, agents, servants, attorneys, and employees, and each of them, be permanently and finally enjoined and restrained from making, using or selling, or threatening, advertising or offering [3] to make, use or sell, any machine for peeling peaches or other fruit containing the invention patented in and by said letters patent, No. 1,104,175, and from infringing either directly or indirectly or in any manner whatever, and also from aiding, abetting and contributing to any such infringement, and that the writ of injunction be issued out of and under the seal of this court enjoining the defendant, its officers, agents, attorneys, servants, and employees, as aforesaid.

III. That it be ordered, adjudged and decreed that plaintiff have and recover from the defendant the profits realized by the defendant and the damages sustained by the plaintiff from and by reason of the infringement aforesaid, together with costs of suit,



and such other and further relief as to the Court may seem proper and in accordance with equity and good conscience.

DUNKLEY COMPANY.

By S. J. DUNKLEY,  
Secretary.

JOHN H. MILLER,

Solicitor and Counsel for Plaintiff,

723-6 Crocker Building,

San Francisco, California. [4]

United States of America,

Northern District of California,

City and County of San Francisco,—ss.

Samuel J. Dunkley, being duly sworn, deposes and says that he is the secretary of the plaintiff mentioned in the within entitled action; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true.

SAMUEL J. DUNKLEY.

Subscribed and sworn to before me this 6th day of August, 1915.

(Seal)

R. B. TREAT,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 6, 1915. W. B. Maling,  
Clerk. By J A. Schaertzer, Deputy Clerk. [5]

**(Subpoena Ad Respondendum.)**

UNITED STATES OF AMERICA.

*District Court of the United States, Northern District of California, Second Division.*

## IN EQUITY.

The President of the United States of America,  
Greeting: To California Canneries Company,

You are hereby commanded, that you be and appear in said District Court of the United States, Second Division, aforesaid, at the courtroom in San Francisco, twenty days from the date hereof, to answer a bill of complaint exhibited against you in said court by Dunkley Company, a corporation created under the laws of the State of Michigan and having its principal place of business at the city of Kalamazoo in the State of Michigan, and to do and receive what the said court shall have considered in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 6th day of August, in the year of our Lord one thousand nine hundred and fifteen and of our Independence the 140th.

[Seal]

WALTER B. MALING,  
Clerk.

By J. A. Schaertzer,  
Deputy Clerk,

MEMORANDUM PURSUANT TO RULE 12,  
RULES OF PRACTICE FOR THE COURTS  
OF EQUITY OF THE UNITED STATES.

You are hereby required to file your answer or other defense in the above suit, on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the clerk's office of said court, pursuant to said bill; otherwise the said bill may be taken pro confesso.

WALTER B. MALING,  
Clerk.

By J. A. Schaertzer,  
Deputy Clerk. [6]

**Return on Service of Writ.**

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Subpoena Ad Respondendum on the therein named California Canneries Company, a corporation, by handing to and leaving a true and correct copy thereof with I. Jacobs, as president of the above-named corporation, personally, at Oakland, California, in said District, on the ninth day of August, A. D. 1915.

J. B. HOLOHAN,  
U. S. Marshal.  
By Thos. F. Mulhall,  
Deputy.

[Endorsed]: Filed Aug. 10, 1915. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [7]

*In the District Court of the United States, in and for  
the Northern District of California, Second  
Division.*

IN EQUITY—No 203.

DUNKLEY COMPANY,

Plaintiff,

vs.

CALIFORNIA CANNERIES COMPANY,

Defendant.

**Answer of the California Canneries Co. to Plaintiff's  
Bill of Complaint.**

The defendant, the California Canneries Company, now and at all times saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the errors or uncertainties or other imperfections contained in said Bill of Complaint, for answer thereto or unto so much thereof as said defendant is advised is material for it to answer, says:

I.

Denies that heretofore, to wit, on and prior to November 29, 1904, or at all, one Samuel J. Dunkley was the original and first, or original or first inventor, or the inventor of a new and useful, or new or useful invention, to wit, a machine for peeling peaches or other fruit, or that *the Samuel J. Dunkley* was the original or first inventor of said invention at all. And that as to the rest of the averments in paragraph four (4) of Plaintiff's Bill of Complaint contained, defendant alleges that it has no informa-



tion or belief sufficient to enable it to answer, and placing its denial upon that ground, said defendant denies that on the 29th day of November, 1904, the said Samuel J. Dunkley made application to the Government of the United States for the issuance to him of letters patent for a machine for peeling peaches and other fruit, and denies that before the issuance of any patent therefor, [8] or at all, said Dunkley sold and assigned, or sold or assigned to plaintiff the said invention or application, together with or without such letters patent as might be granted thereon.

## II.

That as to the allegations contained in paragraphs five, six and seven of said Bill of Complaint of plaintiff, said defendant alleges that it has no information or belief sufficient to enable it to answer, and basing its denial upon that ground, said defendant denies each and every, all and singular the allegations contained in said paragraphs five, six and seven of plaintiff's said Bill of Complaint.

## III.

Said defendant denies that since the issuance of letters patent, as alleged in said Bill of Complaint, in the Northern District of California, or otherwise, the said defendant, without the license or consent of plaintiff has made and used, and is now engaged in using, or has made or used, or is now engaged in using machines for peeling peaches and other fruit, containing the invention patented in and by said letters patent No. 1,104,175, or that defendant has thereby or at all infringed upon said letters patent, and said defendant denies that by reason of the infringement,

as alleged in said Bill of Complaint, or by reason of any infringement, or at all, defendant has realized profits or plaintiff has suffered damages. And defendant alleges that the said Samuel J. Dunkley was not the original or first inventor or discoverer of the invention purported to be covered by said letters patent, or of any material or substantial parts thereof and that the same, or material or substantial parts thereof had been in public use and on sale in this country prior to said alleged invention and for more than two years prior to the application for said letters patent. [9] And defendant specifies, as instances of such prior use, that it, the said defendant, or its predecessors, ever since the year 1886, has been using a machine or machines for peeling peaches, involving the material or substantial parts of the invention claimed by the said plaintiff under the letters patent referred to in plaintiff's said Bill of Complaint. That defendant at the present time has only one machine in use for peeling peaches and other fruit, and that the said machine has been in use by said defendant for more than twelve (12) years last past, and that the same was purchased more than twelve (12) years ago by the said defendant from one A. I. Judge.

WHEREFORE, said defendant, having fully answered plaintiff's said Bill of Complaint, in so far as it is advised the said plaintiff is entitled to the relief demanded in said Bill of Complaint, or any part thereof, or any relief whatsoever, and prays to be

hence dismissed with its reasonable charges in this behalf.

CALIFORNIA CANNERIES COMPANY.

By ISIDOR JACOBS,

President.

ASHER, MEYERSTEIN & McNUTT,

Solicitors for Defendant.

JOSEPH C. MEYERSTEIN,

Of Counsel. [10]

United States of America,

State and Northern District of California,

City and County of San Francisco,—ss.

Isidor Jacobs, being first duly sworn, deposes and says: That he is an officer, to wit, president of the corporation defendant in the within-entitled action; that he has read the foregoing answer to plaintiff's Bill of Complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon his information or belief, and that as to those matters he believes it to be true.

ISIDOR JACOBS.

Subscribed and sworn to before me this 15th day of September, A. D. 1915.

[Seal]

JULIUS CALMANN,

Notary Public in and for the City and County of San Francisco, State of California.

Due service and receipt of a copy of the within Answer is hereby admitted this 15th day of September, 1915.

JOHN H. MILLER,

Attorney for Plff.

[Endorsed]: Filed Sep. 15, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [11]

---

At a stated term of the District Court of the United States for the Northern District of California, Second Division, to wit, the November, 1915, term, held at the courtroom thereof at the city and county of San Francisco, State of California, on the 23d day of December, A. D. 1915. Present: Honorable WILLIAM C. VAN FLEET, United States District Judge.

IN EQUITY—No. 203.

DUNKLEY COMPANY,

Plaintiff,

vs.

CALIFORNIA CANNERIES COMPANY,

Defendant.

**Interlocutory Decree.**

This cause came to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof it was ORDERED, ADJUDGED and DECREED as follows, to wit:

1. That the full name of the plaintiff is Dunkley Company, and during all the times mentioned in the Bill of Complaint, said Dunkley Company was and still is a corporation created under the laws of the State of Michigan, and having its principal place of business at Kalamazoo, in said State of Michigan.

2. That the full name of the defendant is California Canneries Company, and during all said times



said defendant was and still is a corporation created and existing under the laws of the State of California, and having its principal place of business at the city and county of San Francisco, in the State of California. [12]

3. That on and prior to November 29, 1904, Samuel J. Dunkley, at Kalamazoo, Michigan, was the original, first and sole inventor of a new and useful invention, to wit, a machine for peeling peaches and other fruit, and on said last-named day duly and regularly made application to the Government of the United States for the issuance to him of letters patent therefor and before the issuance of any such patent, said Dunkley sold and assigned to the Dunkley Company, a corporation created under the laws of the State of Michigan, plaintiff herein, the afore-said invention and application together with such letters patent as might be granted thereon, and in and by such assignment requested that the said letters patent issue to the said assignee, the Dunkley Company.

4. That such proceedings were had and taken in the matter of said application, that thereafter, to wit, on July 21, 1914, letters patent of the United States for said invention, numbered 1,104,175, dated on said last-named day, were granted, issued and delivered by the Government of the United States to the said Dunkley Company, a corporation created under the laws of the State of Michigan, whereby there was granted to the said Dunkley Company, its successors and assigns, the sole and exclusive right to make, use and vend the said invention throughout

the United States of America, and the territories thereof, for the period of seventeen years, from July 21, 1914; that ever since the issuance of said letters patent, plaintiff has been and still is the owner and holder thereof.

5. That since the issuance of said letters patent plaintiff has practiced the said invention by putting into use and causing to be put into use machines containing and embodying the invention patented in and by said letters patent and upon each of such machines has marked the word "Patented," together with the date and number of said letters patent. [13]

6. That the said letters patent, No. 1,104,175, dated July 21, 1914, are good and valid in law as to claims 5, 6, 14, 19, 20, 21, 22, 23, 24, 25 and 26—those being the only claims in respect of which infringement was charged in this case against the defendant.

7. That since the issuance of said letters patent, and within the Northern District of California, in the State of California, the defendant herein, California Canneries Company, a corporation created under the laws of the State of California, without the license or consent of the plaintiff has made and used machines for the peeling of peaches and other fruit containing and embodying the invention described in said letters patent and claimed and protected in and by said claims 5, 6, 14, 19, 20, 21, 22, 23, 24, 25 and 26, and has thereby infringed upon the said mentioned claims and each of them.

8. That each and all of the allegations in the Bill

of Complaint herein contained are true and that none of the defenses set up in the Defendant's Answer are sustained by the evidence, and that each and all of said defenses be and the same are hereby overruled.

9. That the defendant, herein, California Canneries Company, a corporation created under the laws of the State of California, its officers, agents, servants, attorneys, workmen and employees, be and they are and each one of them be and he is hereby permanently enjoined, and restrained from making, using or selling any machine or other devices for peeling peaches or other fruit containing or embodying the inventions described in said letters patent and claimed, patented and protected in and by said claims 5, 6, 14, 19, 20, 21, 22, 23, 24, 25 and 26 of said letters patent, No 1,104,175, dated July 21, 1914, or either or any of the said claims, and that a permanent writ of injunction be [14] issued out of and under the seal of this court commanding and enjoining the said defendant, its officers, agents, servants, attorneys, workmen and employees, as aforesaid, which said claims are in the words and figures following, to wit:

“5. In a peach-peeling machine, the combination with a tank for containing a skin-softening and loosening liquid, of a heater therefor, a conveyor passing through the tank for conveying the peaches into, through and out of said liquid, and a group of perforated water pipes for spraying the peaches with water as they pass length-

wise of and between said pipes, substantially as specified.

“6. In a peach-peeling machine, the combination with a tank for containing a skin-softening and loosening liquid, of a heater therefor, a conveyor passing through the tank for conveying the peaches into, through and out of said liquid, a group of perforated water pipes at the discharge end of said conveyor for spraying the peaches with water as they pass lengthwise of and between said pipes, and an endless conveyor arranged longitudinally of and between two of said pipes, substantially as specified.

“14. In a peach-peeling machine, the combination with a tank for containing a skin-softening and loosening liquid, of a heater therefor, a conveyor passing through the tank for conveying the peaches into, through and out of said liquid, a group of perforated water pipes at the discharging end of said conveyor for spraying the peaches with water as they pass lengthwise of and between said pipes, and a chute or hopper for automatically delivering the peaches to the tank conveyor, substantially as specified.

“19. In an apparatus for treating fruit such as peaches, means for removing previously disintegrated skin from the fruit, including a support for the fruit, means for effecting a change of position of the fruit on said supports, and means for directing peeling water jets upon said fruit.



“20. In an apparatus for removing the previously disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing a peeling water jet upon said fruit as it advances.

“21. In an apparatus for removing the previously disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing peeling jets of water at intervals upon said fruit as it advances.

“22. In an apparatus for removing the previously disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, means [15] for directing peeling jets of water at intervals upon said fruit from above and below as it advances.

“23. In a peeling machine for removing the previously disintegrated skin from fruit or vegetables, means for directing water sprays against the separate specimens thereof, and means for turning the said specimens to present all parts thereof to the spray for the purpose specified.

“24. In a peeling machine for removing the previously disintegrated skin from fruit or vegetables, means for directing the water sprays against the separate specimens thereof, and a support with means for turning the said specimens to present all parts thereof to the spray for the purpose specified.

“25. In a peach-peeling machine for remov-

ing the previously disintegrated skin from fruit or vegetables, means for directing water sprays against the separate specimens thereof, and means for turning the said specimens to present all parts thereof to the spray for the purpose specified.

“26. In a peach-peeling machine for removing the previously disintegrated skin from fruit or vegetables, means for directing the water sprays against the separate specimens thereof, and a support with means for turning the said specimens to present all parts thereof to the spray for the purpose specified.”

10. That plaintiff do have and recover of and from the defendant, California Canneries Company, the profits which the defendant has realized and the damages which the plaintiff has sustained from and by reason of the infringement aforesaid, and for the purpose of ascertaining and stating the amount of said profits and damages, it is ORDERED, ADJUDGED and DECREED that this cause be referred to H. M. Wright, Esq., Standing Master in Chancery of this court, to ascertain, take, state and report to this court an account of all the profits received, realized or accrued by and to the defendant and to assess all the damages suffered by the plaintiff from and by reason of the infringement aforesaid, and that on said accounting the plaintiff have the right to cause an examination of the officers, agents, servants, attorneys, workmen and employees of the defendant *ore tenus* and also be entitled to the [16] produc-

tion of the books, vouchers, documents and records of the defendant in connection with the accounting, and that the said officers, agents, servants, attorneys, workmen and employees of the defendant attend for such purpose before the Master from time to time as the Master shall direct.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the plaintiff do have and recover its costs and disbursements in this suit to be hereafter taxed, and that plaintiff have the right to apply to the Court from time to time for such other and further relief as may be necessary and proper in the premises.

WM. C. VAN FLEET,

Judge.

Service of the within Interlocutory Decree admitted this 23d day of December, A. D. 1915.

ASHER, MEYERSTEIN & McNUTT,

McN.

For Defendant.

[Endorsed]: Filed and Entered December 23, 1915.  
Walter B. Maling, Clerk. By J. A. Schaertzer,  
Deputy Clerk. [17]

---

*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

IN EQUITY—No. 203.

DUNKLEY COMPANY,

Plaintiff,

vs.

CALIFORNIA CANNERIES COMPANY,

Defendant.

**Petition for Order Allowing Appeal.**

California Canneries Company, the above-named defendant conceiving itself to be aggrieved by the interlocutory decree made and entered in the above-entitled cause in the above-entitled court, on the 20th day of December, 1915, wherein and whereby it was ordered, adjudged and decreed, that the defendant without the license or consent of the plaintiff, has made and used for the peeling of peaches and other fruits, containing and embodying invention described in letters patent No. 1,104,175, dated July 21, 1914, and claimed and protected in and by claims Nos. 5, 6, 14, 19, 20, 21, 22, 23, 24, 25 and 26, and has thereby infringed upon the said mentioned claims, and each of them; and that the defendant be perpetually enjoined from using, making or selling any machine or other devices for peeling peaches or other fruit containing or embodying the inventions described in said letters patent, and claimed and patented and protected in and by said claims last referred to, or any of them sued upon in said cause described in Complainant's Bill of Complaint, and by which Interlocutory Order and Decree, complainant was awarded a permanent injunction against the said defendant; and wherein and whereby it was decreed that plaintiff have and recover of defendant the profits which defendant has realized and the [18] damages which plaintiff has sustained from and by reason of the infringement aforesaid, and the said cause was referred to the standing Master in Chancery, of this court, to ascertain and



report to this court, an account of said profits and damages.

HEREBY petition said court for an order allowing said defendant to prosecute an Appeal from said Interlocutory Decree granting said permanent injunction to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, under and in accordance to the laws of the United States, in that behalf made and provided. Also that an order be made fixing the amount of security, which the said defendant shall give and furnish upon such appeal.

And your petitioner will ever pray.

ASHER, MEYERSTEIN & McNUTT,  
Solicitors for Defendant.

[Endorsed]: Filed Jan. 14, 1916. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [19]

---

*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

IN EQUITY—No. 203.

DUNKLEY COMPANY,

Plaintiff,

vs.

CALIFORNIA CANNERIES COMPANY,

Defendant.

**Assignment of Errors.**

Now comes the California Canners Company, the defendant in the above-entitled cause, and files the

following assignment of errors upon which it will rely in the United States Circuit Court of Appeals for the Ninth Circuit, and which it will rely upon its appeal in the above-entitled cause, viz.:

Error of the Court in granting the permanent injunction.

Error of the Court in finding that letters patent No. 1,104,175, dated July 21, 1914, are good and valid in law as to claims, 5, 6, 14, 19, 20, 21, 22, 23, 24, 25, and 26, or as to any of them, or as to any claims in said patent.

Error of the Court in finding, that since the issuance of said letters patent, the defendant herein, the California Canneries Company, without the license or consent of plaintiff has made or used machines or machine for peeling peaches or other fruit containing or embodying the invention described in said letters patent and claimed and protected in and by said claims 5, 6, 14, 19, 20, 21, 22, 23, 24, 25 and 26, or any of them and has thereby or otherwise infringed upon the said mentioned claims or any of them or any claim of the said letters patent. [20]

Error of the Court in finding that each and all of the allegations in the Bill of Complaint herein contained are true and particularly in finding that allegation eight (8) page three (3) of the said Bill of Complaint is true as follows: That since the issuance of said letters patent in the Northern District of California, and elsewhere, the defendant without the license or consent of the plaintiff, has made and used and is now engaged in using machines for peeling peaches or other fruit, containing or embodying

in and by the said letters patent No. 1,104,175, and has thereby infringed upon the said letters patent, and that by reason of the infringement aforesaid, defendant has realized profits and plaintiff has suffered damages; and in finding that none of the defenses set up in the defendant's answer are sustained by the evidence, and overruling each and all of the said defenses; and particularly in finding untrue the defense set up in paragraph three (3) of the Answer of the said defendant to be untrue.

Error of the Court in adjudging and decreeing that the defendant be perpetually enjoined and restrained from making, using or selling *and* machine or other device for the peeling of peaches or other fruit, containing or embodying the invention described in said letters patent, and claimed, patented and protected in and by claims 5, 6, 14, 19, 20, 21, 22, 23, 24, 25 and 26 of said letters patent or any of them; and in granting and causing to be issued out of the said court an injunction enjoining the defendant as aforesaid.

Error of the Court in finding and adjudging that device or machine found to have been used by the defendant and which the evidence before the Court proves to have been used by the defendant, was or is in any particular the mechanical equivalent of the invention embraced in the said letters patent, or in any claim thereof, or was or is in any particular an infringement [21] upon the said letters patent, or any claim thereof; and particularly in finding that the said device or machine proven to have been used

by defendant, is an infringement upon or the mechanical equivalent of the invention or device of plaintiff as described in the following claims of said patent, or any of them, to wit:

“5. In a peach-peeling machine, the combination with a tank for containing a skin-softening and loosening liquid, of a heater therefor, a conveyor passing through the tank for conveying the peaches into, through and out of said liquid, and a group of perforated water pipes for spraying the peaches with water as they pass lengthwise of and between said pipes, substantially as specified.

“6. In a peach-peeling machine, the combination with a tank for containing a skin-softening and loosening liquid, of a heater therefor, a conveyor passing through the tank for conveying the peaches into, through and out of said liquid, a group of perforated water pipes at the discharge end of said conveyor for spraying the peaches with water as they pass lengthwise of and between said pipes, and an endless conveyor arranged longitudinally of and between two of said pipes, substantially as specified.

“14. In a peach-peeling machine, the combination with a tank for containing a skin-softening and loosening liquid, of a heater therefor, a conveyor passing through the tank for conveying the peaches into, through and out of said liquid, a group of perforated water pipes at the discharging end of said conveyor for spraying



the peaches with water as they pass lengthwise of and between said pipes, and a chute or hopper for automatically delivering the peaches to the tank conveyor, substantially as specified.

“16. In an apparatus for *trating* fruit such as peaches, means for removing previously disintegrated skin from the fruit, including a support for the fruit, means for effecting a change of position of the fruit, on said supports, and means for directing peeling water jets upon said fruit.

“20. In an apparatus for removing the previously disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means of directing a peeling water jet from said fruit as it advances.

“21. In an apparatus for removing the previously disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing peeling jets of water at intervals upon said fruit as it advances.

“22. In an apparatus for removing the previously distintegrated skin from fruit, the combination with means for supporting and advancing the fruit, means for directing peeling jets of water at intervals upon said fruit from above and below as it advances. [22]

“23. In a peeling machine for removing the previously disintegrated skin from fruit or vegetables, means for directing water sprays against the separate specimens thereof, and means for

turning the said specimens to present all parts thereof to the spray for the purpose specified.

“24. In a peeling machine for removing the previously disintegrated skin from fruit or vegetables, means for directing the water sprays against the separate specimens thereof, and a support with means for turning the said specimens to present all parts thereof to the spray for the purpose specified.

“25. In a peach-peeling machine for removing the previously disintegrated skin from fruit or vegetables, means for directing water sprays against the separate specimens thereof, and means for turning the said specimens to present all parts thereof to the spray for the purpose specified.

“26. In a peeling machine for removing the previously disintegrated skin from fruit or vegetables, means for directing the water sprays against the separate specimens thereof, and a support with means for turning the said specimens to present all parts thereof to the spray for the purpose specified.

Error of the Court in adjudging and decreeing that plaintiff recover from defendant, profits which defendant has realized, or any profits, and damages which plaintiff has sustained, or any damage, by reason of the infringement found to have been committed by defendant upon the rights of plaintiff as embraced and set forth in said patent.

Error of the Court in adjudging that the plaintiff

have and recover its costs and disbursements in this suit.

WHEREFORE, the said defendant prays that the judgment of the District Court be reversed and that such other and further order be made as may be meet and proper in the premises.

ASHER, MEYERSTEIN & McNUTT,  
Solicitors for Defendant.

[Endorsed]: File Jan. 14, 1916. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [23]

---

*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

IN EQUITY—No. 203.

DUNKLEY COMPANY,

Plaintiff,

vs.

CALIFORNIA CANNERIES COMPANY,

Defendant.

**Order Allowing Appeal.**

Upon motion of Asher, Meyerstein & McNutt, counsel for defendant, and on filing the petition of the California Canneries Company, the defendant, together with an assignment of errors.

IT IS ORDERED that an Appeal be and is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit, from the Interlocutory Order entered on the 20th day of December, 1915, granting an injunction against the defendant herein

and decreeing that plaintiff have and recover from defendant, profit which defendant has realized and damages which plaintiff has sustained, and an order and reference to the standing Master in Chancery for the ascertainment and report of said profits and damages.

AND IT IS FURTHER ORDERED, adjudged and decreed that until the determination of the appeal herein, all further proceedings in the court below be stayed.

That the amount of the Bond upon said Appeal, be, and the same is hereby fixed at the sum of Five Thousand (\$5,000) Dollars.

IT IS FURTHER ORDERED, that a certified transcript [24] of the record and proceedings be forthwith transmitted to the said United States Court of Appeals.

WM. C. VAN FLEET,  
Judge.

[Endorsed]: Filed Jan. 18, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

---

*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

IN EQUITY—No. 203.

DUNKLEY COMPANY,

Plaintiff,

vs.

CALIFORNIA CANNERIES COMPANY,

Defendant.



**Undertaking on Appeal.**

Know All Men by These Presents, That the California Canneries Company, a corporation organized and existing under and by virtue of the laws of the State of California, and the Hartford Accident and Indemnity Company, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, as surety are, and each of them is held and firmly bound unto the Dunkley Company, a corporation, in the sum of Five Thousand and 00/100 (\$5,000) Dollars, to be paid unto the said Dunkley Company, its successors and assigns, for which payment, well and truly to be made, the said California Canneries Company, and the Hartford Accident and Indemnity Company bind themselves and each of them and their successors and assigns, firmly by these presents, sealed with their respective corporate seals, dated this 19th day of January, 1916.

The condition of the above-named obligation is such that, whereas the above-named defendant has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the order made and entered by the United States District Court for the Northern District of California, Second Division, in the above-entitled cause, granting a permanent injunction enjoining and restraining the defendant, its agents [26] servants, etc., from manufacturing, selling, or using, or offering for sale, any machine or device for peeling peaches or other fruit, embodying the invention described in United States letters patent No. 1,104,175, granted Dunkley

Company, July 21st, 1914, and claimed by claims Nos. 5, 6, 14, 19, 20, 21, 22, 23, 24, 25 and 26 thereof, as heretofore construed by this Court, and ordering a reference to the standing Master in Chancery, for the purpose of ascertaining and reporting to the said Court, the profits of the said defendant, and the damages sustained by the said plaintiff, by the use by said defendant of a certain peach-peeling machine, which said order was rendered and entered in the said District Court and a Writ of Injunction issued in conformity therewith on the 20th day of December, 1915.

Now, therefore, if the above-named defendant shall prosecute said appeal to effect and answer all damages and costs if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

CALIFORNIA CANNERIES CO.

By ISIDOR JACOBS, (Seal)

President.

HARTFORD ACCIDENT AND INDEMNITY  
COMPANY.

H. EVERETT CHARLTON, (Seal)

Resident Assistant Secretary. [27]

State of California,

City and County of San Francisco,—ss.

On this 19th day of January, in the year one thousand nine hundred and sixteen before me, James Mason a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared H. Everett Charlton

known to me to be the resident assistant secretary of Hartford Accident and Indemnity Company, the Corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the said city and county of San Francisco, the day and year in this certificate first above written.

[Seal]

JAMES MASON,

Notary Public, in and for the City and County of  
San Francisco, State of California.

My commission will expire December 4th, 1919.

Approved Jany. 19, 1916.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Jan. 19, 1916. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [28]

---

*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

IN EQUITY—No. 203.

DUNKLEY COMPANY,

Plaintiff,

vs.

CALIFORNIA CANNERIES COMPANY,

Defendant.

**Praeceptum [for Transcript of Record].**

To the Clerk of the Above-entitled Court:

The above-entitled court, having rendered in the above-entitled cause an Interlocutory Decree on the 20th day of December, A. D. 1915, and the said California Canneries Company, defendant above named, having appealed from said Decree to the United States Circuit Court of Appeals for the Ninth Circuit .

YOU ARE HEREBY requested to make up, as and for the record to be used in and upon the said appeal, the following:

Bill of Complaint for Infringement of Patent.

Answer of California Canneries Company to the  
Bill of Complaint.

Subpoena ad Respondendum.

Interlocutory Decree Granting Permanent Injunction and Ordering Reference to Standing Master in Chancery for Ascertainment for Damages and Profits.

Writ of Injunction.

Petition for Order Allowing Appeal.

Assignment of Errors.

Order Allowing Appeal.

Undertaking on Appeal.

Citation.

and a statement of the evidence introduced by and on behalf of the respective parties upon the trial in the above-entitled [29] court, of the above-entitled action, together with the documentary evidence



and exhibits offered and received in evidence in the above-entitled cause.

ASHER, MEYERSTEIN & McNUTT,  
Attorneys for California Canneries Company, Defendant and Appellant.

Service and receipt of a copy of the within Praecipe is hereby admitted this 20th day of January, 1916.

JOHN H. MILLER,  
Attorneys for Plff.

[Endorsed]: Filed Jan. 26, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [30]

---

*In the District Court of the United States, in and for the Northern District of California, Second Division.*

No. 203—EQUITY.

DUNKLEY COMPANY,

Plaintiff,

vs.

CALIFORNIA CANNERIES COMPANY,

Defendant.

**Certificate of Clerk U. S. District Court to  
Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing thirty (30) pages, numbered from 1 to 30 inclusive, to be full, true and correct copies of the records and proceedings as enumerated in the praecipe for tran-

script of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$16.40; that said amount was paid by Asher, Meyerstein & McNutt, Esqrs., attorneys for defendant; and that the original citation issued herein is hereunto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 9th day of March, A. D. 1916.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled  
March 9, '16. J. A. S.] [31]

---

**[Citation on Appeal.]**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Dunkley  
Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the

Northern District of California, wherein California Canneries Company is appellant, and you are appellee, to show cause, if any there be, why the interlocutory decree rendered against the said appellant and granting a permanent injunction, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 19th day of January, A. D. 1916.

WM. C. VAN FLEET,  
United States District Judge. [32]

[Endorsed]: No. 203. United States Circuit Court for the Northern District of California. Dunkley Company, Appellee, vs. California Canneries Company, Appellant. Citation on Appeal. Filed Jan. 19, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk

Receipt of copy of the within Citation admitted this 19th day of January, 1916.

JOHN H. MILLER,  
Solicitor for Plaintiff.

---

[Endorsed]: No. 2764. United States Circuit Court of Appeals for the Ninth Circuit. California Canneries Company, a Corporation, Appellant, vs. Dunkley Company, a Corporation, Appellee. Tran-

script of Record. Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Filed March 18, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

---

*In the United States Circuit Court of Appeals, for  
the Ninth Circuit.*

No. —.

CALIFORNIA CANNERIES COMPANY,  
Appellant,

vs.

DUNKLEY COMPANY,  
Appellee.

**Order Extending Time to File Record and Docket  
Case.**

On reading and filing the annexed Stipulation, and good cause appearing therefor,

IT IS ORDERED that appellant above named have to and including the 20th day of March, 1916, within which to file record of appeal herein and to docket said case with the clerk of the above-entitled court.

Dated this 20th day of February, 1916.

WM. W. MORROW,  
Judge of Said Court.



*In the United States Circuit Court of Appeals, for  
the Ninth Circuit.*

No. —.

CALIFORNIA CANNERIES COMPANY,  
Appellant,

vs.

DUNKLEY COMPANY,  
Appellee.

**Stipulation Extending Time to File Record on  
Appeal and to Docket Case With the Clerk of  
the Court Above Entitled.**

IT IS HEREBY STIPULATED by and between  
the respective parties hereto that the appellant  
above named have to and including the 20th day of  
March, 1916, within which to file its record on ap-  
peal in the above-entitled case and to docket the  
said case with the clerk of said court.

Dated this 14th day of February, 1916.

JOHN H. MILLER,

Attorney for Appellee.

ASHER, MEYERSTEIN & McNUTT,

Attorneys for Appellant.

MAXWELL McNUTT,

Of Counsel for Appellant.

[Endorsed]: No. 2764. In the United States  
Circuit Court of Appeals for the Ninth Circuit.  
California Canneries Co., Appellant, vs. Dunkley  
Company, Appellee. Stipulation and Order Extend-  
ing Time to File Record and to Docket Case. Filed  
Feb. 15, 1916. F. D. Monckton, Clerk. Refiled,  
Mar. 18, 1916. F. D. Monckton, Clerk.



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

CALIFORNIA CANNERIES COMPANY, a Corporation,

Appellant,

VS.

DUNKLEY COMPANY, a Corporation,

Appellee.

---

Supplemental Transcript of Record.

---

Upon Appeal from the United States District Court for the  
Northern District of California, Second Division.

---

Filed

MAY 18 1903

F. D. Monckton,

Clerk





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

CALIFORNIA CANNERIES COMPANY, a Corporation,  
Appellant,  
vs.  
DUNKLEY COMPANY, a Corporation,  
Appellee.

---

**Supplemental Transcript of Record.**

---

Upon Appeal from the United States District Court for the  
Northern District of California, Second Division.

---



# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Certificate of Clerk U. S. District Court to Engrossed Statement of the Record of the Proceedings, Filed February 17, 1916.....	12
Engrossed Statement of the Record of the Proceedings in the Above-entitled Case, to be Used by the Defendant Above Named, on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.....	3
Stipulation Re Statement of Evidence, etc....	1
Stipulation That Original Exhibits Need not be Printed, etc....	13
TESTIMONY ON BEHALF OF PLAINTIFF:	
DUNKLEY, MELVILLE E.....	3
Cross-examination .....	6
DUNKLEY, SAMUEL J. (in Rebuttal) ..	10
TESTIMONY ON BEHALF OF DEFENDANT:	
JACOBS, ISIDOR .....	10





*In the United States Circuit Court of Appeals, in and  
for the Ninth Circuit.*

No. 2764.

CALIFORNIA CANNERIES COMPANY, a Corporation,

Appellant,

vs.

DUNKLEY COMPANY, a Corporation,

Appellee.

**Stipulation [Re Statement of Evidence, etc.]**

WHEREAS, by inadvertance, there was omitted from the printed record of the above-entitled cause lodged with the above-entitled Court, to be used in and upon the appeal in this case, a statement of the evidence introduced by and on behalf of the respective parties upon the trial of this cause in the District Court of the United States, in and for the Northern District of California, Second Division, in the action numbered therein 203, and entitled in the records of said Court, Dunkley Company, plaintiff, vs. California Canneries Company, defendant, and

WHEREAS, there was likewise omitted from the printed record aforesaid, the documentary records and the exhibits received in evidence upon the trial aforesaid notwithstanding the fact that the matters thus omitted were called for by the praecipe, duly filed by the appellant herein to the clerk of said District Court, and notwithstanding said statement and evidence was, within the time allowed by law, duly lodged with said Court,

NOW, THEREFORE, IT IS HEREBY STIPULATED, by and between the respective parties hereto, acting through their respective attorneys that the clerk of the court above entitled may cause the matter thus omitted to be printed and appended to the transcript of the record herein for use upon the appeal in this case.

JOHN H. MILLER,

Attorney for Appellee.

ASHER, MEYERSTEIN & McNUTT,

Attorneys for Appellant.

MAXWELL McNUTT,

Of Counsel.

Due service and receipt of a copy of the within stipulation is hereby admitted this —— day of April, 1916.

---

---

Attorney for Appellee.

[Endorsed]: No. 2764. Dept. No. ——. U. S. Circuit Court of Appeals, State of California, Ninth District. California Canneries Co., a Corporation, Appelant, vs. Dunkley Company, a Corporation, Appellee. Stipulation.

*In the District Court of the United States, in and for  
the Northern District of California, Second Di-  
vision.*

IN EQUITY—No. 203.

DUNKLEY COMPANY,

Plaintiff,

vs.

CALIFORNIA CANNERIES COMPANY,

Defendant.

**Engrossed Statement of the Record of the Proceed-  
ings in the Above-entitled Case, to be Used by  
the Defendant Above Named, on Appeal to the  
United States Circuit Court of Appeals for the  
Ninth Circuit.**

The above-entitled cause came on regularly for trial, Friday, the 3d day of December, 1915, by and before the above-entitled court, the Honorable William C. Van Fleet, presiding, plaintiff being represented by John H. Miller, Esq., and Fred Chappel, Esq., and the defendant, by Messrs, Asher, Meyerstein & McNutt, thereupon the following proceedings were had:

**[Statement of Testimony of Melville E. Dunkley, for  
Plaintiff.]**

MELVILLE E. DUNKLEY, called for the plaintiff, duly sworn, testified as follows:

“I am 35 years of age; reside at Kalamazoo, Michigan; by occupation, a manufacturer. I have examined the defendant’s machine for peeling peaches. It consists of a scalding of the so-called

(Testimony of Melville E. Dunkley.)

'Grasshopper' model, which is a tank containing, sometimes hot water, and sometimes a solution of caustic soda, with a chute for discharging the contents, operated by an archimedial [1\*] screw. From this scalding, the fruit is discharged onto a conveyor table, about 45 feet long, the apron thereof being made of spiral webbing, half-inch mesh the first 5 or 6 feet to the table, covered by metal splash pans to take care of the spatter. Under this metal guard is a series of pipes fitted with nozzles consisting of the common Boston garden nozzle and the so-called Oakland nozzle. Underneath the belt conveyor, and in opposition to the above nozzles, was a battery of similar nozzles, being from 60 to 70 in each battery. There is an arrangement of rollers in pairs, operated on a central shaft, the purpose of which is to cause a jumping or shaking motion of the belt, which being operated at a high speed, would tend to change the position of the fruit on the belt.

At this point, there were introduced into the evidence, marked "Exhibit 1," sketch of defendant's machine made by witness, and United States Letters Patent, No. 1, 104, 175, and dated July 21, 1914, and marked "Plaintiff's Exhibit 2."

In the water-line is a pump evidently to raise the water pressure, supply pipe to each of the batteries is approximately one and one-half inches in diameter and main pipe, two inches. I am familiar with the machine described in the Dunkley patent, and the superiority of the Dunkley method over the hand-

---

\*Page-number appearing at foot of page of original certified Supplemental Transcript of Record.



(Testimony of Melville E. Dunkley.)

peeling method. There are two ways of peeling peaches by hand. One Sinclair-Scott rotary machine, which revolves peaches against a stationary knife and which is somewhat faster than the ordinary hand method. With the Sinclair-Scott machine, a woman could peel 10 to 12 bushels a day. With the hand method, somewhat less, depending on the size of the peaches. The Dunkley machine has peeled 1800 bushels in 9 hours. To work it, there are required a man to feed the machine, a man for the [2] water pressure, 4 or 5 men to carry away the peeled peaches. By the Sinclair-Scott method, one-eighth of the peach is taken off; by the hand method more; by the Dunkley method, only the skin is taken off and the peeled peaches are absolutely uniform, with no marks. On "Exhibit 1," A represents the main tank. The peaches are introduced at the point marked B through a hopper, picked up by the screw contained in spout C and ejected at the point on spout D, the screw being revolved. E represents the motive power; fruit is dropped from the spout C on to moving conveyor table F, which revolves, as indicated by arrow, carries the fruit away from C through and between the opposite spray nozzle G. The scaling tank contains a disintegrating solution. The revolving agitators H and the water supply I. The shaft J causes the conveyor belt to rise and fall, giving a jumping motion to the fruit. There is no brush feature in defendant's machine. Its peeling or eliminating feature is simply the action of the water jets.

(Testimony of Melville E. Dunkley.)

At this juncture, there was introduced into the evidence, marked "Exhibit 3" two nozzles of the type used on defendant's machine.

Cross-examination.

The spray of defendant's machine removes the peeling. The spray in the Dunkley machine removes the peeling. There is no brush in defendant's machine. The novelty of the Dunkley device does not inhere in the nozzle. The novelty of the Dunkley device inheres in the use of jets of water under comparatively high pressure to remove the disintegrating skin from the fruit, no particular form of nozzle being necessary and consists in the fact of water pressure, rather than the character of nozzle by which [3] it is exerted. In my opinion, defendant's machine infringes Dunkley's patent on all points. It has a means for carrying peaches and presenting them to the water jets. It has the jets and its evident function is to present the peaches in as rapid and regular order as possible to the action of the jets, the agitation further being to expose all parts of the fruit to the water. The Dunkley device, as described in the drawing in evidence, is for whole peaches. Defendant's device, described in Exhibit 1 is for half peaches. The Dunkley machine, with the revolving brushes could not be successfully used on halved peaches. We have very successfully used it on halved peaches, however, by removing the revolving brushes and adding in their place either a guard to keep the halved peaches from going off at the side of another series of perforated pipes; they

(Testimony of Melville E. Dunkley.)

are in operation at the present time in that method. With the halved peaches there is scarcely any agitation with the exception that the belt which carries these peaches through runs at such a speed that it gets away from the halved peaches; in other words, it runs away from them. It runs on a slight incline, and the majority of the peaches are either turned over as they go back, that is the belt goes from underneath them, or else they get up on their sides and roll, rolling backwards. This belt travels between 1,000 and 1,500 feet of belt feet every minute and that will raise the peach up, with the halved peach, and while it carries through it will revolve it backwards, in that way presenting all of its surface to the jets of water. The Dunkley machine, as described in exhibit 2, is adapted to peeling whole peaches. The brush, in the Dunkley device, on the whole peach with the solid belt, changes the position of the whole peach, exposing its surface uniformly to the water jets. [4] The brush belt in the Dunkley machine has the same effect on the whole peach that speed does on the half peach. It revolves it backwards, while being carried through the sprays. One cylindrical brush, operating at 350 and the other at 600, so that as the peach goes through the machine it is continually being revolved backwards, being turned over hundreds of times in practically every direction. There are no nozzles used in the Dunkley machine. Perforated pipes answer the same purpose. The brushes in the Dunkley machine are arranged spirally.

At this juncture, there were introduced into evi-

(Testimony of Melville E. Dunkley.)

dence, designs, Plaintiff's Exhibits 4 and 5.

The function of the brushes is as follows: The fruit comes from the scalding into the hopper, shown at the right hand side of exhibit 4. They have a converging bottom, which leads the fruit in single file on to the belt, shown practically in parallel lines with the hopper. The fruit is carried between the brushes, the brush belt running at high speed, having the tendency to revolve the peaches backward. The side brushes engage the peach alternately, so that the one revolving from the top catches the peach and swings it back. The peaches are passed in single file progressively through and between the lines of brushes. A top pipe is mounted above and equally distant between the two revolving brushes, so that jets of water are directed down on to the peach and jets of water from the pipe inside of the brushes are thrown against the peach. In the defendant's device, the agitators do practically the same thing, as the brushes in the Dunkley device. In the defendant's device, the peaches are fed continually and carried on the moving belts, thus spread out by the aid of agitators under the water spray. In the Dunkley device, the peaches on the water [5] spray are arranged parallel with the brushes, there being no brushes in the defendant's device."

The COURT.—"Then, if I gather the effect of your testimony practically, what you regard as the essential principle or patentable principal in your device is the combination by which this fruit after having been processed with the liquor that disinte-



(Testimony of Melville E. Dunkley.)

grates the skin, is passed through between a system of opposing jets of water which removes the skin.

A. With the exception that they really do not have to be opposed.

Q. I am not stating that in any such sense as you take it; it means so arranged that all of the different parts of the surface of the fruit are exposed to the jets at some time when they are passing through.

A. Yes."

At this juncture, sketch made by the witness, was introduced into the evidence and marked "Plaintiff's Exhibit 6."

Exhibit 6 is a drawing of the agitating device in defendant's machine and is the equivalent of the device represented by the two cylinder brushes, K and K-1, in the Dunkley patent. Apart from the brushes, there is no agitating means in the Dunkley device. If the brushes were taken out of the Dunkley machine, the necessary agitation to present the different faces of the fruit to the jets would be accomplished by the speed of the belt. With sufficient water pressure, however, the agitators would be necessary in the defendant's machine. In the Dunkley device, the peaches are carried and exposed to the erosive force of water in single file. When the brushes are withdrawn, the peaches would pass not necessarily in single file. I believe, that the means of presenting the entire surface of the peach in combination with the water jets are practically the same in the defendant's device and the Dunkley device. In the Dunkley device, the belt conveyor [6] con-

(Testimony of Melville E. Dunkley.)

sists of fibre bristles, which become soaked with water and soft, making a cushion for carrying the peaches, there being no metal on the conveyor table, but it is substantially a continuous brush, the brushes being as near together as possible, consistent with permitting the conveyor to rotate.

At this juncture, it was stipulated that the drawing, "Exhibit 1" represented the machine used by the defendant; that the patent, No. 1,104,175, and dated July 21, 1914, had been issued to the Dunkley Company; that the parties to the action respectively are corporations.

Plaintiff here rested.

**[Statement of Testimony of Isidor Jacobs, for Defendant.]**

ISIDOR JACOBS, called for the defendant, sworn, and testified: That he resided in San Francisco, and is the president of the California Canneries Company, defendant;

That the scalders used for many years in the defendant's machine, as represented by "Plaintiff's Exhibit 1" was an eastern invention and of the so-called "Grasshopper" model.

Defendant rested.

**[Statement of Testimony of Samuel J. Dunkley, for Plaintiff, in Rebuttal.]**

SAMUEL J. DUNKLEY, called for plaintiff in rebuttal, sworn and testified:

I reside in Kalamazoo, Michigan; age 54; occupation, manufacturer, inventor and canner. I am the

(Testimony of Samuel J. Dunkley.)

inventor of the device covered by United States Letters Patent, No. 1,104,175, dated July 21, 1914, in suit. I first thought of the invention during the peach season of 1902 in Michigan. Made some sketches and plans and peeled some peaches and got ready for a larger machine next year. The first machine was put up in July, 1903, and successfully operated; since then the machine has been used by [7] practically every canner in the country; it has reduced the price of peeling peaches from between 20 and 30 cents a bushel down to practically nothing, has revolutionized the business. We got up the machine and had it running so it would do on the average of 18,000 to 20,000 bushels a season, in the South factory. The application for patent was filed in 1904, and remained in the Patent Office in interference until issued.

Plaintiff rested.

ASHER, MEYERSTEIN and McNUTT,  
Attorneys for Defendant.  
MAXWELL McNUTT,  
Of Counsel.

IT IS HEREBY STIPULATED by and between the respective parties hereto that the foregoing Engrossed Statement is correct.

JOHN H. MILLER,  
Atty. for Plff.  
ASHER, MEYERSTEIN & McNUTT,  
Attorneys for Defendant.  
MAXWELL McNUTT,  
Of Counsel.

Feb. 8th, 1916.

Approved Feb. 15, 1916.

WM. C. VAN FLEET,  
Judge.

[Endorsed]: Filed Feb, 17, 1916. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [8]

---

**[Certificate of Clerk U. S. District Court to Engrossed Statement of the Record of the Proceedings, Filed February 17, 1916.]**

No. 203—EQUITY.

DUNKLEY COMPANY,

vs.

CALIFORNIA CANNERIES COMPANY,

United States of America,

Northern District of California,

City and County of San Francisco,—ss.

I, Walter B. Maling, Clerk of the District Court of the United States of America, in and for the Northern District of California, do hereby certify the foregoing to be a full, true and correct copy of the original Engrossed Statement of the record of the proceedings, filed February 17, 1916, in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court,



this 5th day of April, A. D. 1916.

[Seal]                      WALTER B. MALING,  
Clerk of the United States District Court, Northern  
District of California.

By J. A. Schaertzer,  
Deputy Clerk.

[Ten-cent Internal Revenue Stamp. Canceled  
April 5. 1916. J. A. S.]

---

[Endorsed]: No. 2764. United States Circuit  
Court of Appeals for the Ninth Circuit. California  
Canneries Company, a Corporation, Appellant, vs.  
Dunkley Company, a Corporation, Appellee. Sup-  
plemental Transcript of Record. Upon Appeal from  
the United States District Court for the Northern  
District of California, Second Division.

Filed April 8, 1916.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

---

**[Stipulation that Original Exhibits Need not be  
Printed, etc.]**

*In the United States Circuit Court of Appeals, in and  
for the Ninth Circuit.*

No. 2764.

CALIFORNIA CANNERIES COMPANY, a Corpo-  
ration,

Appellant,

vs.

DUNKLEY COMPANY, a Corporation,

Appellee.

It is hereby stipulated by and between the respective parties hereto, acting through their respective attorneys, that the clerk of the above-entitled court may omit from the record to be printed and used herein on the appeal of this case, the documentary evidence and exhibits offered and received in evidence upon the trial of the case in the District Court of the United States, in and for the Northern District of California,.

JOHN H. MILLER.

Attorney for Appellee.

ASHER, MEYERSTEIN & McNUTT,

Attorneys for Appellant.

MAXWELL McNUTT,

Of Counsel.

[Endorsed]: No. 2764. In the United States Circuit Court of Appeals for the Ninth Circuit. California Canneries Co., a Corporation, Appellant, vs. Dunkley Company, a Corporation, Appellee. Stipulation. Filed May 1, 1916. F. D. Monckton, Clerk.

No. 2764

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

CALIFORNIA CANNERIES COMPANY

(a corporation),

*Appellant,*

vs.

DUNKLEY COMPANY (a corporation),

*Appellee.*

## BRIEF FOR APPELLANT.

ASHER, MEYERSTEIN & McNUTT,

*Attorneys for Appellant.*

JOSEPH C. MEYERSTEIN,

*Of Counsel.*

*Filed this*.....*day of May, 1916.*

*FRANK D. MONCKTON, Clerk.*

*By*.....*Deputy Clerk.*





No. 2764

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

CALIFORNIA CANNERIES COMPANY

(a corporation),

*Appellant,*

vs.

DUNKLEY COMPANY (a corporation),

*Appellee.*

## BRIEF FOR APPELLANT.

---

### Statement of Facts.

Dunkley Company, appellee, as the owner of letters patent, Nos. 1, 104, 175, covering an invention consisting of a combination device for loosening the skin of, and peeling peaches and other fruits, brought an action to enjoin the use by appellant California Canneries Company of a machine used by it for peeling peaches, alleging that the latter infringed its patent; appellant denied infringement. After trial of the case, the United States District Court for the Ninth District, Second Division, made its interlocutory order adjudging that appellant's device infringed said patent, granted an injunction

permanently restraining the use by appellant of its machine, and ordered a reference for the ascertainment of profits and damages. The court found that appellant's machine invaded the patentee's rights, as set forth in and protected by claims Nos. 5, 6, 14, 19, 20, 21, 22, 23, 24, 25 and 26 of its said patent.

In its said letters patent, the inventor describes his invention as follows:

"Be it known that I, Samuel J. Dunkley, a citizen of the United States, residing in Kalamazoo, in the county of Kalamazoo and State of Michigan, have invented a new and useful Improvement in Machines for Peeling Peaches and other Fruit, of which the following is a specification.

"My invention relates to machines for peeling peaches, or other fruit or vegetables.

"The object of my invention is to provide a machine or apparatus of a simple, efficient and durable construction, by means of which peaches, or other fruit or vegetables, may be automatically peeled very rapidly and cheaply, *and without injury to or mutilation of the fruit or the like*, and by which also the skin or peel may be removed without waste of the pulp.

"My invention consists in the means I employ to practically accomplish this object or result; that is to say it consists, in combination with a peel or skin softening, disintegrating or shriveling means or device, preferably consisting of a tank or chamber containing a heated fluid, and a heater for the same, a conveyor for automatically conveying the peaches through the skin softening, disintegrating or shriveling device and subjecting the peaches to its action for *uniform and measured time*, a chute or device for delivering the peaches *in single file line to a brushing and washing mechanism*, and a peach

*brushing and washing mechanism*, preferably comprising a group of three long perforated pipes for spraying water upon the moving line of peaches, and subjecting them to a water *brushing action*, an endless belt *brush* arranged between the two lowermost perforated pipes and operating to *brush the peaches* as they are rotated and to convey them along, and a pair of oppositely rotating cylindrical brushes operating both to rotate and *brush the peaches*, and having hollow perforated pipe cores for spraying the rotary brushes with water, and rotary cylindrical rubber sponge brushes, also having hollow perforated pipe cores for supplying the same with water; whereby the peaches may be very rapidly and cheaply and perfectly peeled, without waste or injury.

“My invention also consists in the novel construction of parts and devices and in the novel combination of parts and devices herein shown or described.” (Our italics.)

The machine of defendant portrayed in Exhibit 1 consists of a moving wire mesh screen or platform, on to which peaches are dropped or placed, and carried forward between jets or sprays of water, arranged in opposition above and below said screen, and during their passage between the opposed jets, the peaches are exposed to the erosive force of the water which washes or removes the previously disintegrated skin therefrom. The said platform or screen is agitated by mechanical means for the purpose, and with the result of disposing the peaches thereon, in a single layer, and of affecting a complete presentation of their surfaces to the erosive force of the water ejected by the jets.

The peaches before being placed upon the screen are treated in a lye bath or scalding medium, it is *not claimed forms any part of the peeling machine proper*, or constitutes any element of the infringement. In a word, for the purpose of testing the matter of infringement, it may be considered that peaches, whose skins have been loosened by dipping in lye, are carried to, and by hand placed upon the screen, which automatically starts them in their progressive course through the water batteries, consisting of opposed nozzles. It is the contention of appellant that its machine is in no legal sense the mechanical equivalent of the patented device, notwithstanding each performs the function of removing the loosened skin from peaches; that a patentee may not be heard to abandon necessary elements of his device, and thus bring under the protection of his patent a device robbed of its essential mechanical parts, for the purpose of stopping the use by another of a machine similar to that covered by the patent, only after the latter has been stripped beyond recognition of those mechanical elements which are of the very spirit of the invention. In the patented combination are specified a chute or device for delivering the peaches in *single file line* to a *brushing* and washing mechanism, the fruit being meanwhile supported upon an endless *brush belt*.

The patented combination consists of a tank for scalding fruit, with means for properly timing the exposure thereof to the erosive force of the liquid



in the tank; means to deliver the treated fruit in a special manner, to wit, single file, on to a platform comprising an endless bristle surface, means, namely, brush-rollers rotating in opposite directions, adapted to at once control the orderly advancement of the fruit and uniformly present it to jets of water ejected from perforated pipes parallel to the brushes, and to brush off, as well as wash off, the skin.

In the appellant's machine there are no brushes, no brush platform, no chute to control the manner of introduction of the fruit to the water jets, and no equivalent of the means in the patented device adapted to affecting the orderly advancement and presentation of the fruit to the sprays, and no means to brush or rub off the skin.

In appellant's machine the peaches are presented haphazard to the jets of water, except that the agitator tends to turn all sides of the fruit to the water sprays.

Appellee contends that it is not confined to a construction calling for a brush platform, brushes to turn, or to rub the fruit, or means to effect single file, presentation of the fruit, but that on the other hand its claims, numbered as above, permit the abandonment of all of these specified physical features, with the result that any device which advances fruit on a moving platform, and thus exposes it to peeling jets of water, is an infringement of its patent.

### **Specification of Errors Relied Upon.**

Appellant has with perhaps unnecessary artificiality specified the errors of law upon which it intends to rely, but in their essence they are:

That the court erred in finding that claims numbers 5, 6, 14, 19, 20, 21, 22, 23, 24, 25 and 26 are valid, and erred in finding that the defendant's machine embodies the mechanical equivalent of the patentee's machine, and hence infringed the patent.

---

### **Argument.**

A patent is to be construed as a contract for the purpose of arriving at its intent and meaning. To ascertain the intent and meaning of a patent, the rules governing interpretation of contracts govern, and the entire instrument, including drawings and specifications, is to be considered in arriving at its intent and meaning.

Hogg v. Emerson, 6 How. 437; 12 Law Ed. 505.

Patents are to be construed to secure to their inventor the real invention he intends to secure by his patent.

Ives v. Hamilton, 92 U. S. 426; 23 L. E. 494.

Appellant contends that when this patent is read in its entirety it assumes to protect more than, and something different from, a machine which by mechanical means merely, effects the exposure of

fruit to water sprays ejected by pipes or nozzles; but rather calls for a combination of parts calculated to advance the fruit in an orderly manner, to present it in a uniform manner, and to brush or rub it while it is being sprayed. In other words, this patent was not intended to cover, and does not cover, a combination for mere water peeling of fruit, the water to be sprayed upon it as it may advance under the spray.

Before determining the matter of whether or not appellant's device infringes the patent in suit, the question must be settled as to what the invention thereby protected consists of. We submit that the device covered by the patent in this case is a mere combination improvement upon means or methods of peeling fruit, and that it involves no element of discovery. Its essence is not in the presentation to the public of the fact or principle that water, played or sprayed upon fruit, which has been treated by lye, will remove the skin. This patent does not represent a pioneer invention, is not original in character, and does not represent the discovery of the erosive force of water as applied to or against a surface. Such invention as is protected by this patent in our view, lies in the method, or combination of means, of applying water to fruit, at the same time handling, manipulating and advancing the fruit in an orderly manner under the water.

The contention of the appellee is that certain of the claims of the patent are so broad as to enable

the patentee to construct his machine in any manner that he desires, so long as such machine performs the office of supporting, turning and advancing fruit while the same is exposed to the force of water jets. Of these general claims, No. 19 may be taken as a type, which reads as follows:

“In an apparatus for treating fruit, such as peaches, means for removing previously disintegrated skin from the fruit, including a support for the fruit, means for effecting a change in the position of the fruit on said support, and means for directing peeling water jets upon said fruit.”

The above claim, and each of the others found to have been invaded, omits all mention of any mechanical means for effecting the orderly advancement of the fruit, and for the control and advancement of it in any particular manner, as the same is exposed to the force of water jets.

Brushes are omitted, or cylinders, consisting of material other than bristles, a bristle platform, or a platform consisting of a material which would perform the office of bristles, chutes for the presentation of the fruit single file; in a word, if the general claims of this patent are to be indulged the force claimed by appellee, a person who rolled, or who caused fruit to be rolled down an inclined platform under a water faucet would necessarily infringe this patent. It will be readily observed from an examination of Exhibits I and II, namely the appellant's device and the patent, respectively, that in the appellant's device any mechanical means



or feature which is calculated to cause the passage of the fruit under the spray in any particular, or controlled or orderly manner, is wanting.

As has been suggested, if the rollers, be they made of bristle or other substance, and the brush platform are not an essential part and of the essence of the invention covered by the patent, then this patentee can practically prevent the washing of fruit in any method other than by hand, upon the theory that it invades his patent.

The strongest argument that might be urged by appellant is the mere presentation for examination of the patent itself. It is an intricate, elaborate and highly specialized piece of machinery, and it seems inconceivable to us that this device, when robbed of all of its mechanical parts can be still said to represent the spirit of the invention, or the actual invention. If the inventor of the telephone, to illustrate, had incorporated in his claims for patent an apparatus which by any means would carry the human voice from one place to another he could with as much reason have sought to stop the use by boys of tin cans the heads of which were connected by a waxed string, upon the theory that such invaded the general claims of his patent, as can this patentee seek to prevent the use by the appellant of a mere platform which carries fruit past, and exposes it to, the force of water ejected from nozzles. It is true that this platform is agitated to turn the fruit over. But an examination of the device, we suggest, must lead to the conclu-

sion that the appellant's device is capable of accomplishing only *accidentally* and *imperfectly*, that which the patented machine is designed to accomplish with completeness, precision and orderliness. It may well be that the appellant's device comes within the letter of the general claims of this patent, but we believe that the language used by the court in the case of *Westinghouse v. Boyden Power Brake Company*, 170 U. S. 537, is applicable in the premises, as follows:

“A device, within the letter of the claims of a patent is not necessarily an infringement, if these, literally construed, do not represent the actual invention.”

And again we urge that the actual invention, as covered by the Dunkley patent, is not a device or a machine for the mere *water* peeling of fruit, but is for a combination of parts which exert certain defined effects upon the fruit, while the same is being sprayed by water.

---

#### NO SUBSTANTIAL IDENTITY.

We contend that there is no substantial identity in the character of the two devices, unless by substantial identity is meant every combination which produces the same result and that in this case the differences are substantial and not merely colorable.

*Singer Mfg. Co. v. Cramer*, 192 U. S. 265.

It certainly may not be said that the device represented by the inventor's drawing and specifica-

tions, or by any claim that describes anything sufficiently to mechanically identify it, is in any sense the mechanical equivalent of the device of the appellant. They have some functional identity in that both machines peel fruit by removing disintegrated skin, with water, but beyond that it is submitted their identity, or even similarity, does not go.

Claims 5, 6, 14, 19 to 26 inclusive, are inconsistent with the real invention embraced in the patent, and hence invalid, as representing a mere attempt to secure to the patentee all peach peeling devices whatsoever, though wholly at variance with, and contrary to, the spirit of the invention. It is submitted that these general claims, if held to be valid, permit the patentee to vary his real invention as circumstances may render expedient. We do not go so far as to contend that the roller brushes, or the bristle platform must be constructed of any specific material, but we do contend, rather, that brushes or cylinders are a necessary part of this invention, as is a platform so constructed as to produce a mechanical rubbing or turning of the fruit. It will be urged doubtless by appellee that these brushes, as a matter of fact, perform no such function as is generally described or known as brushing, because when they become wet they are softened to such an extent that they exert no erosive force on the fruit. This position, however, is inconsistent with the fact that the platform itself is made of bristles, which would overcome the ar-

gument which might be advanced in this regard, for if the bristle platform, so carefully specified and illustrated, in the nature of things performs no function, it would not have found its place in the scheme.

It is respectfully submitted that the device of the appellant does not infringe the invention protected by the patent in suit, even though it may literally infringe claims 5, 6, 14, 19 to 26 inclusive, because these claims, being inconsistent with and not expressing the essence of the invention, cannot have, in law, the effect of securing to the inventor protection for a device for peeling fruit by water by *any means whatsoever*, so long as water jets are included or used. It is therefore respectfully submitted that the decree rendered herein should be reversed.

Dated, San Francisco,  
May 10, 1916.

ASHER, MEYERSTEIN & McNUTT,  
*Attorneys for Appellant.*

JOSEPH C. MEYERSTEIN,  
*Of Counsel.*







# INDEX.

	Page
Correction of the Statement of the Case.....	1
Argument .....	2
Patent should be construed as an entire document	2
Claims of patent in suit considered. Action of water jets .....	3
Decision of Court of Appeals for District of Co- lumbia held Dunkley first.....	4
Defendant's machine .....	5
Authorities of defendant's brief on infringement considered .....	5
Dunkley's position supported by recent Supreme Court decisions, applying Westinghouse vs. Boyden .....	6
Conclusion .....	7

## Authorities:

Continental Paper Bag Co. vs. Eastern Paper Bag Co., 210 U. S. 405; 52 L. Ed. 1122.....	7
Davis Sewing Machine Co. vs. New Departure, 217 Fed. 775 .....	2, 4
Hobbs vs. Beach, 180 U. S. 383, 45 L. Ed. 586...	7
Hogg vs. Emerson, 6 How. 437, 12 L. Ed. 505...	2, 4
Ives vs. Hamilton, 92 U. S. 426, 23 L. Ed. 494....	2, 4
National Tube vs. Mark, 216 Fed. 508.....	3
Scaife vs. Falls City Mills, 209 Fed. 211.....	3
Singer Mfg. Co. vs. Cramer, 192 U. S. 265, 48 L. Ed. 437.....	5
Westinghouse vs. Boyden Power Brake Co., 170 U. S. 537, 42 L. Ed. 1136.....	5, 7





UNITED STATES CIRCUIT COURT OF APPEALS,  
FOR THE NINTH CIRCUIT.

CALIFORNIA CANNERIES COM- PANY, a Corporation, Defendant-Appellant, vs. DUNKLEY COMPANY, a Corpora- tion, - Plaintiff-Appellee.	}	In Equity, No. 2764
---	---	------------------------

**BRIEF ON BEHALF OF PLAINTIFF-APPELLEE.**

**Correction of Statement of the Case.**

It is not possible to agree entirely with Defendant-Appellant's "Statement of Facts", because it is at fault, particularly about the scope of the claims.

It is said, at page 4 of Appellant's brief:

"In a word, for the purpose of testing the matter of infringement, it may be considered that peaches, whose skins have been loosened by dipping in lye, are carried to, and by hand placed upon the screen", etc.

Claims 5 and 6 of the Dunkley patent embrace in their terms

"the combination with a tank for containing a skin softening and loosening liquid, of a heater therefor, a conveyor passing through the tank for conveying the peaches into, through and out of said liquid,"

as will be seen by reference to such claims. Claim 14 also includes the same features.

The group of claims from 19 to 26 inclusive refer to the treatment of peaches for the removing of **previously** disintegrated skin, and the statement in appellant's brief applies to this group of claims.

## ARGUMENT.

### Patent Should Be Construed as an Entire Document.

It is easy to agree with the defendant-appellant as to principles of law laid down in **Hogg vs. Emerson**, 6 How. 437, 12 L. Ed. 505, and **Ives vs. Hamilton**, 92 U. S. 426, 23 L. Ed. 494, referred to at page 6 of the brief. The language made use of, particularly in **Hogg vs. Emerson**, is especially pertinent here, the Court saying, toward the bottom of page 485:

"We cannot consent to be over astute in sustaining objections to patents. 4 East, 135; **Crosley v. Beverly**, 3 Car. & Payne, 513, 514. The true rule of construction in respect to patents and specifications, and the doings generally of inventors, is to apply to them plain and ordinary principles, as we have endeavored to on this occasion, and not, in this most metaphysical branch of modern law, to yield to subtilities and technicalities, unsuited to the subject, and not in keeping with the liberal spirit of the age, and likely to prove ruinous to a class of the community, so inconsiderate and unskilled in business, as men of genius and inventors usually are."

This is of high consequence in the proper construction of a patent, and the principle has been very wisely applied by the Circuit Court of Appeals for the Sixth Circuit in

**Davis Sewing Machine Co. vs. New Departure**,  
217 Fed. 775,

Judge Denison, speaking for that Court, saying, at p. 784:

“In determining whether the ambiguous terms of a claim should be confined more or less closely to the form shown in the drawings, it is usually well to compare with other claims which may not be in suit; and if we find other claims which call for the specific construction of a part mentioned more generally in the claims in suit, that will be a persuasive reason for not giving the limited construction to the general terms.”

This is especially pertinent in view of the construction sought to be imposed upon the claims by defendant-appellant.

See also

**National Tube vs. Mark**, 216 Fed. 508-521;  
**Scaife vs. Falls City Mills**, 209 Fed. 211, at 216.

### **Claims of Patent in Suit Considered. Action of Water Jets.**

It will be noted that there are 26 claims in the patent in suit. Claims 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 17 and 18 include as elements brushes in one form or another. Claim 15 has to do with the automatic means for delivering the peaches in a single file, and Claim 16 has to do with special arrangements in conjunction with the tank for the softening and loosening liquid, calling for a screen and the like.

So it will be seen that special features urged as features of the Dunkley patent are made the special features of other claims. The description supports the contention of plaintiff-appellee that a **water brushing action** is intended to be claimed, because that phrase is used at line 39 on page 1 of the patent. At page 2, line 28 occurs the description:

"This washing or brushing mechanism comprises a group of, preferably, three water pipes G, having a series of perforations g arranged to strike the peaches as they are conveyed along between the pipes, and thus to impart to the peaches a rotary movement."

Also at line 69, page 2, it is stated:

"The perforated water pipes G G G, preferably extend beyond the rotary brushes K. K<sup>1</sup>, so that the water spray may entirely free the surface of the peaches and the like from any particles of skin or peel."

At line 113, page 2, it is said:

"The water peeling means here shown are available wherever the skin of the fruit or vegetable has been suitably disintegrated or loosened."

It will thus be seen that the special claims here insisted upon are justified when the entire document is taken into consideration, according to the rules of law in **Hogg vs. Emerson**, and in **Ives vs. Hamilton**, and as laid down by the Court of Appeals for the Sixth Circuit in **Davis vs. New Departure**.

#### Decision of Court of Appeals for District of Columbia held Dunkley First.

This interpretation of the claims is entirely in accord with the decision of the Circuit Court of Appeals for the District of Columbia, reversing the decision of the Commissioner of Patents, and allowing the claims.

Counsel will submit copy of that decision with underscoring in red to facilitate the consideration of the matter.



Copy of the patent will also be submitted with underscoring in red to point out the features indicating the water peeling action in the claims insisted upon, and with underscoring in blue in the claims not insisted upon, so that the special features thereof will at once be appreciated and stand out.

### Defendant's Machine.

Considering the drawing of defendant's device, there is seen to be a tank B, conveyor means C, an endless belt F of spiral webbing of half-inch mesh, spray nozzles above and below, and revolving agitators H for shaking the belt, constituting "means for effecting a change of position of the fruit on said support."

The defendant's machine constitutes everything called for in the various claims in suit. There is the endless conveyor: it has not any brush, but the distinction between claim 6, sued upon, and claim 7 is that the "endless conveyor" referred to in the third line from the bottom of the claim 6, is specified as "an endless conveyor brush" in the third line from the bottom of claim 7.

It thus is very clear that the terminology of Claim 6 was especially to hold a conveyor of the type appearing in defendant's machine. A reference to all of the other claims, in view of this explanation, will show every element present, operating in the same way to produce the same results. Infringement is clear.

### Authorities of Defendant's Brief on Infringement Considered.

Defendant-appellant has dwelt to a considerable extent upon the law as laid down in **Westinghouse vs. Boyden**, and in **Singer Mfg. Co. vs. Cramer**. In both these cases there was an anticipatory art, and in both cases the defendant's structure operated by an entirely different

means from that specified in the patent. Therefore, such decisions cannot be considered pertinent here, because their rules cannot be applied.

The Court of Appeals for the District of Columbia in passing on this structure said:

“Dunkley was the first to invent and put into practice a rapid and effective machine for peeling peaches.”

Nothing in this record contravenes that statement. A reference to the testimony shows that a machine would do on the average 18,000 to 20,000 bushels a season,—see Supplemental Transcript of Record, p. 11; that is, hundreds of bushels a day, as a matter of fact. And machines of this principle have been used by practically every canner in the country.

The invention of the Dunkley machine was revolutionary in its character. There is nothing appears in this record to anticipate any part of the invention, much less the particular combination of means recited. The case was definitely passed on in open court trial by the Court below, who had opportunity to satisfy himself as to the statements of any and all witnesses and as to all details. We submit that his decision is entitled to the highest respect for this reason, and also for the further reason that there is absolutely nothing in the record that shows any reason or grounds for any different conclusion.

#### **Dunkley's Position Supported by Recent Supreme Court Decisions, Applying *Westinghouse vs. Boyden*.**

The position of Plaintiff-Appellee as to the construction of the Dunkley patent and as to the infringement by Defendant's structure, is abundantly supported by recent Supreme Court decisions. The claims of the Dunkley patent are not for a function but for mechanical means. See

**Continental Paper Bag Co. vs. Eastern Paper  
Bag Co.**, 210 U. S. 405, at p. 442;  
52 L. Ed. 1122, at 1129;

**Hobbs vs. Beach**, 180 U. S. 383, 45 L. Ed. 586,

The principle of law in the latter case is thoroughly discussed beginning at p. 400 of the U. S. Report, p. 595 of Lawyers Edition. **Westinghouse vs. Boyden Power Brake Co.** is applied in this case and its doctrine fully explained.

The decree of the Court below should be affirmed, the injunction should be enforced, and the accounting of profits and damages proceeded with, at the cost of defendant-appellant.

Respectfully submitted.

FRED L. CHAPPELL,  
JOHN H. MILLER,

Counsel for Plaintiff-Appellee.













